

SOUTH AFRICA / JUDGMENT

M.H v O.T (16858/2017) [2018] ZAWCHC 191; 2023 (3) SA 159 (WCC) (4 July 2018)

[2018] ZAWCHC 191

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

16858/2017

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Republic

of South Africa

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 16858/2017

In

the matter between:

MH

Applicant

v

OT

Respondent

Court:

Justice J Cloete

Heard:

3, 7, 28 and 29 May 2018

Delivered:

4 July 2018

JUDGMENT

CLOETE J:

Introduction

- [1] The parties, who were never married, are the biological parents of a boy, K, born on 13 May 2013 and who is thus 5 years old. The applicant mother wishes to relocate permanently to the Netherlands with K and has approached court for permission to do so. The respondent father opposes the relocation and is supported in his opposition by the Family Advocate.
- [2] It is common cause that, at least since a few months after K's birth, the parties have been locked in almost continuous conflict. If anything, it has escalated over the years since K's birth. As is usually the case, each blames the other for causing the conflict. This conflict is one of the primary reasons why the mother wishes to relocate with K because, she says, she cannot continue to live in perpetual battle with the father.
- [3] The father, supported by the Family Advocate, is of the view that this is not a good enough reason to allow a relocation and that, given the level of distrust between the parties, and what he considers to be the mother's ongoing frustration of his contact with K, the odds are that, if she is granted permission, his relationship with K will be all but destroyed.
- [4] The mother's other reasons for wishing to relocate are the usual, namely advanced employment prospects and a better life for her and K in the country in which she grew up and will be surrounded by her nuclear family. The father is also a Dutch national but has acquired permanent residence in South Africa. By all accounts, he is largely estranged from those of his family members who still reside in the Netherlands. He is in a stable and loving relationship here and he and his partner do not wish to also relocate to the Netherlands. The father declined to make any contact proposals in the event that the mother's application succeeds.
- [5] The other reasons advanced by the mother cannot really be disputed by the father, and his objections thereto are far from convincing. They are apparent from the papers and need not be repeated. I will accordingly focus on the conflict aspect and how it has impacted on the mother and, more importantly, K.

Relevant

background

- [6] On 12 December 2014 the father approached court under case number 22347/14 for an order declaring that he and the mother are co-holders of parental responsibilities and rights (including guardianship) in terms of s 18 and s 21 of the Children's Act 38 of 2005 ("the Act").

- [7] On an interim basis he sought orders for certain contact and for the Family Advocate to conduct an investigation and furnish recommendations on the main relief as well as his contact with K going forward.
- [8] On 25 March 2015 an order was granted by agreement in which inter alia clinical psychologist Ms Toni Raphael (“Raphael”) was appointed to investigate and provide recommendations on the above issues, certain interim contact with detailed conditions was put in place, and the parties were to undergo psychiatric and psychometric assessment.
- [9] Raphael conducted a thorough investigation. She produced two reports, the first dated 15 May 2015 and the second dated 5 November 2015.

[10] In her first report Raphael gave the following material opinions:

10.1 The mother, with whom K had a positive and secure attachment, had not tried to alienate K from the father;

10.2 The mother’s initial aim had been to co-parent with the father on a more equitable basis, but after K’s birth and on the advice of others, she decided that she did not want the father to acquire co-parental responsibilities and rights, her reasons being that she did not believe that the father was capable of putting K’s interests first, and was concerned about his parenting judgment, his aggression, abuse and violence towards her, and his refusal to take advice;

10.3 The father had always had some contact with K, albeit – prior to any court order – on the mother’s terms and with stringent conditions at times;

10.4 The imposition of more stringent conditions had followed incidents in which, according to the mother, the father had been physically violent towards her in K’s presence;

10.5 The mother had been the victim of the father’s physical and verbal abuse on several occasions, was under significant emotional strain and showing signs of anxiety and possible post-traumatic stress, but was functioning more than adequately in all areas of her life;

10.6 The father was not always truthful, was rigid and arrogant in his opinions, not at all open to suggestions about K’s needs, deliberately disregarded requests by the mother in relation thereto, responded with irritation and anger when he felt criticised or disagreed with, and could be bullying and intimidating;

10.7 The father had failed to pay maintenance for K to the mother and despite his allegations to the contrary there was no evidence that the mother had refused to accept such payment; but

10.8 Despite all this, K had a positive attachment to the father who clearly loved him.

[11] Raphael’s second report contained the following substantive opinions:

11.1 Although the mother had not withheld contact in terms of the order of 25 March 2015, she was inflexible and prescriptive in negotiations around variation of contact, abiding by the letter of the law if not always the spirit thereof;

11.2 However the mother was like that in an attempt to manage and minimise her communication with the father, due to her experience of being flooded with and overwhelmed by his demands, requests and emails;

11.3 The father could be uncontained and obsessive in his dealings with the mother, in communication with her as well as other parties, did not respect the mother's boundaries and was in fact insensitive to the boundaries of others in general;

11.4 Most of the conflict and acrimony related to the parties' relationship with each other, rather than their respective relationships with K; and

11.5 While both were "good enough" parents, the father's obsessive and punitive conduct towards the mother, which amounted to harassment, coupled with their complete mutual lack of trust, led to the conclusion that the minimum requirements for co-parenting K were lacking.

[12] As is clear from her reports, Raphael was able to convincingly support her opinions with reference to collateral sources as well as the reports of the professionals referred to in the March 2015 order. There is no reason to question them.

[13] On 9 December 2015 the parties concluded an extremely detailed and comprehensive settlement agreement running to 21 pages which followed Raphael's recommendations in respect of parental responsibilities and rights including contact. The settlement agreement was made an order of court on the same day.

[14] By agreement, the mother was granted full parental responsibilities and rights and it was specifically recorded in clause 1.2 that the father 'does not have the right of care or guardianship'. It was further provided that the father:

'...shall have the specific parental right to have contact with K in terms of Section 18(2)(b) of the Children's Act and the parental responsibility to contribute towards K's maintenance in terms of Section 18(2)(d) of the Children's Act.'

[15] Clause 8.5 however stipulates that the father's consent is nonetheless required for the mother to relocate permanently from South Africa together with K.

[16] In clause 5.1 the father expressly acknowledged that his consent was not required for any of the decisions pertaining to K contained therein (including, for present purposes, those relating to K's education and medical care). Clauses 6.5 to 6.7 provide that the father cannot approach K's school or teachers other than for the purpose of attending school-related events and occasions when parents are specifically invited, and that neither party shall involve the school in any conflict between themselves.

[17] Clause 8.1 stipulates that all communication between the parties is to be kept to a minimum and restricted to text messages and emails in relation to certain specific issues. At the time of conclusion of the settlement agreement the mother had successfully obtained a Protection Order against the father. He breached the order and was subsequently convicted. His expressed intention to appeal apparently did not eventuate. In her second report

Raphael stated that the father's harassment of the mother could not be allowed to continue. The parties agreed in clause 8.3 of the settlement agreement that K's best interests 'require that the Court Order [incorporating the settlement agreement] and the Protection Order are strictly complied with'. In clause 9 a facilitator was appointed to facilitate the agreed contact.

- [18] Clause 10, dealing with the father's obligation to contribute R2 000 per month as maintenance for K was deleted at the father's insistence, this despite his much later disclosure during the course of argument in these proceedings that on 4 November 2013 (more than 2 years prior to conclusion of the settlement agreement) he invested €8 570.80 in a fund in the Netherlands, ostensibly for the purpose of enabling him 'to contribute towards K's education and general well being'.
- [19] It is moreover common cause that the first occasion on which the father commenced payment of maintenance (of R2 100 per month) was on 9 April 2018, less than a month before this application was due to be argued. In an email dated 12 March 2018 the father accused the mother of 'taking one-sided decisions' (more about this later) while simultaneously extorting money from him. He informed her that 'since I started a new job per 1 March 2018 I have decided to honour your initial demand'. The father reported to the Family Counsellor that from March 2016 until February 2017 he earned R13 000 per month and from July until September 2017 R5 000 per month. Given these facts, it is reasonable to infer that his last minute payment of maintenance was rather an attempt to portray himself favourably to the court.
- [20] The serious concerns raised by Raphael were not heeded by the father. He did not seek professional help to address them. He only attended filial therapy recommended by Raphael, a parenting course (on his own) and an early childhood development course.
- [21] During the hearing of argument this was pertinently raised with the father's counsel. This caused the father to depose to a further affidavit on 25 May 2018, in which he alleged that in February 2018 he proposed to the Family Advocate that both parties undergo psychological treatment but this, it would appear, was in the context of his proposed revision to the parenting plan incorporated in the settlement agreement. He also alleged that he had proposed to the Family Counsellor and his own expert, Ms Cawood, 'on or during the period of February 2018 to April 2018' that he attend anger management treatment.
- [22] Whatever he might have proposed at such a late stage, he did not follow through, and he did not require permission from these individuals in any event. His lack of insight is rather demonstrated by the following averment in that affidavit:

'It must be noted that I am not an aggressive person and shall never physically, or in any other way, harm Applicant, or anyone else for that matter. However, having regard for the fact that Applicant views me as aggressive, I suggested submitting myself for anger management treatment, this also as a gesture of good faith and to ease Applicant's mindset.'

[emphasis supplied]

- [23] In her second report Raphael, with reference to the parties' psychometric profiles, reported that they were remarkably similar. According to her, there were features of Narcissistic Personality Disorder and Obsessive Compulsive Personality Disorder on both profiles. While the mother has also, to my mind, demonstrated a lack of insight by not obtaining professional help, this should perhaps be viewed in the context of Raphael's opinion that the father functions 'more typically narcissistic' than the mother, specifically in terms of grandiosity and rage. His reaction to criticism and correction, his tendency to project aspects of his own personality onto others, and his poor interpersonal boundaries are all narcissistic indicators. Both parties find it difficult to accept external correction or instruction, and neither demonstrates insight into their contribution to the conflict. The father tends to externalise his feelings of frustration and anger, while the mother tends to internalise hers. Raphael was also of the opinion that for the mother this results in increased anxiety which causes symptoms of depression and a greater need to control, making her excessively inflexible in terms of her own coping mechanisms. Raphael noted that prolonged conflict and litigation around child care will magnify most individuals' dysfunction and/or pathology. All of these factors made for a highly dysfunctional interaction between the parties.
- [24] Raphael subsequently withdrew as jointly appointed expert due to the father's gross and highly disturbing invasion of her private life. The facilitators involved also both subsequently resigned.
- [25] The first, Mr Craig Schneider who is an attorney, family law mediator and facilitator, resigned because he could not make progress with the father. Although he found the mother challenging, in his experience the father consistently refused to accept that his viewpoint might be wrong. The second was Dr Glyde Thompson, a clinical psychologist. He experienced the mother as compliant and engaging from the outset, displaying a high degree of patience with the process. On the other hand he experienced the father as non-compliant with an aggressive and erratic demeanour and behaviour, unable to take direction or accept feedback.
- [26] Another clinical psychologist involved during roughly mid-2016, Mr Larry Loebenstein, noted the conflict between the parties and the critical attitude which each had of the other's parenting. He also noted that this spilled over into contact handovers. He was of the opinion however that K and the father had a very positive and well bonded relationship.
- [27] Loebenstein reported that during the process he developed a good relationship with the father and felt that the father was becoming increasingly logical in his understanding and ability to deal with the situation, although, as with the mother, he had a tendency to drag up the past in a vengeful way.
- [28] He described the parties' relationship as 'extremely toxic' and expressed the opinion that unless it abated and they found a more positive way to co-parent, this was likely to have significant

negative effects on K. As he put it, because K is so well bonded to each parent there will come a stage at which he will suffer from split loyalty. This is likely to cause K a great deal of anxiety which could develop into clinical symptoms.

- [29] Despite the progress which Loebenstein felt he was making with the father, at some stage the father became aggrieved with him, was aggressive towards him and apparently threatened to report him to the Health Professions Council of South Africa. Loebenstein was of the opinion that this was a characteristic of the father's functioning in that upon becoming aggrieved he became angry and vindictive.
- [30] The ongoing conflict between the parties has undoubtedly been exacerbated even further by the father's apparent inability to accept that he has relinquished any potential right to make decisions about K's life, in particular his education and medical care. Numerous instances are documented in the papers which demonstrate that the father does not consider himself bound by the settlement agreement incorporated in the December 2015 order.
- [31] This has resulted in the father repeatedly trying to involve K's school and teachers in the conflict, accusing them of frustrating what he considers to be his parental rights (but which he simply does not have) and interfering in the mother's decisions pertaining to K's medical care and treatment. This has not only caused the mother great distress and embarrassment, but the school and medical professionals find it both unacceptable and invasive.
- [32] It would appear that at some point subsequent to the December 2015 order the father unsuccessfully applied to court to have the parenting plan incorporated in the settlement agreement revisited. The details are sketchy and I thus make no further mention thereof, save to note that his unsuccessful attempt has not deterred the father from purporting to exercise parental rights which he does not have and dragging third parties into the fray.
- [33] What is also noted is that, in addition to involvement of professionals, the courts and third parties, there is a history of involvement, at the instance of both parties, of the South African Police. The foregoing demonstrates the deep rooted and severe nature of the conflict.
- [34] The mother launched the current application on 18 September 2017. She had by then appointed clinical psychologists Mr Martin Yodaiken and Ms Pam Tudin ("YT") to conduct an assessment and provide recommendations to the court on the proposed relocation. The YT report was produced on 22 November 2017 and, as is evident from that report, they too experienced the father as threatening in his attitude towards them at a point.

[35] In summary, their material opinions were as follows:

35.1 While the parties' personality traits manifest themselves both in their personal interaction and with third parties, in the case of the mother they are less pronounced with others than the father's. She is more able to contain hers, expressing them largely in suspicion and obsessive behaviour as opposed to the father's aggression;

35.2 In their personal interaction the father has a tendency to escalate to the point where he is unable to contain his aggression whereas the mother's response is rigidity, and it is a cycle from which neither is able to extricate themselves;

35.3 This is also evident from email correspondence between the parties over the period 2016 and 2017, which demonstrates that the conflict has reached intractable levels. There is constant, hostile nit-picking about contact with K and other aspects of his life and '...the problem is that both parties have become polarised in their positions. As K is central to the conflict between these too polarised parents it is likely to incrementally affect his psychological wellbeing and development'.

[36] YT were of the opinion that '...there can be little doubt when the criteria associated with evaluations of relocation are considered there are a number of points which do not meet these criteria'. There were really however only two such criteria and YT expressed them as follows:

36.1 K was still developing a relationship with the father (at that point, overnight contact had not yet commenced); and

36.2 The mother's anxiety about K's safety when with the father (which the experts all found to be baseless), taken together with her gatekeeping and rigidity about contact, raised concern that there is no guarantee that she will foster contact if a relocation is permitted.

[37] However, given the intractable conflictual relationship between the parents and its risks in the long term for K, this was considered by YT to be one of the more powerful factors supporting a relocation. As they put it:

'It cannot be underlined sufficiently...how detrimental the conflict that arises from this dynamic is to each of the individuals but more importantly, to K, as he develops and forms his separate relationships with each of his parents.

It is the opinion of the writers that this dynamic between the parents is potentially so detrimental to the best interests of K that it warrants serious consideration in terms of a relocation. Not only does this apply to the potential effect directly on K, but also should the mother remain in a state of rigidity and anxiety it will affect her ability to parent K during his early formative years where he so desperately needs the input of a relaxed and containing mother. While she has managed to sustain and compartmentalise this aspect to her parenting...given some of her experienced trauma, she will not be able to do so in the long term.

Given the parties' intractable and conflictual approach to each other, it is very likely that the same pattern of engagement will persist. While the adults have choices in this regard, K does not.'

[38] YT expressed the opinion that the proposed relocation will put enough separation between the parties to make the conflict of less impact on both the mother and K; will also allow K not to be the continual focus of the conflict; and will in that way eliminate the potential for him to become so embroiled as a factor in the conflict that it affects him developmentally.

They also recommended that overnight contact should commence without further delay so as to solidify the relationship between K and the father and that safeguards be put in place to ensure that the contact continues post relocation.

- [39] They concluded by referring to Raphael's opinion in her 2015 report where she stated that the greatest potential harm to K lies in his parents' relationship with and interaction between each other. It was the opinion of YT that:

'The nature of this dynamic has not changed and in the writers' view the emotional risks to K have only increased. Geographic distance now, together with separation, may be the only way in which K can be assured of a healthy relationship with each one of his parents.

When consideration is given to the similarity between...Raphael's 2015 findings and the present evaluation it is evident that very little has changed in two years. This is significant in terms of understanding the poor prognosis regarding any potential improvement of the situation given the duration and complex nature of the parties' conflict.'

- [40] Overnight contact commenced shortly after the YT report in December 2017. The concern raised by them about the developing relationship between K and his father has since been adequately addressed when regard is had to the reports of the supervising social worker, Ms Magdel Oosthuizen, the father's own appointed expert, social worker Ms Anne Cawood, and that of the Family Counsellor, Ms Laura Baartman.

- [41] Oosthuizen observed that the bond and emotional attachment between K and his father is very close, and that he is able to separate with ease from the mother who, all the experts involved agree, is K's primary attachment figure. In her report dated 15 April 2018 Cawood expressed the opinion that '...in spite of the enormity of the conflict between his parents since his birth, K presents as a happy, secure and confident 4 year old, with an obviously discernible close bond with his father'. In her report dated 13 March 2018 Ms Baartman agreed that K's engagement with the father is secure and that he shares a close attachment with him.

- [42] Both Cawood and Baartman acknowledged however that K has begun to exhibit behavioural problems at school. Baartman obtained the following information from K's teacher, Ms Brusse, who has taught him since January 2018. According to Ms Brusse, there has not been a day without some form of incident involving K either crashing into other children or scratching, punching and kicking them. Baartman reported that:

'f) Ms Brusse described K as an angry little chap and although there are other children with normal boundary and behavioural challenges, K stands out when it comes to the latter;

- g) K is selective on what he wants to hear and ignores the teacher when she is attempting to talk with him about his behaviour and therefore shows disregard for authority;
- h) K appears to be confused about boundaries and what acceptable and not acceptable behaviour is...

- i) K engages in rough play and he comes across as aggressive and does not comprehend or understand that in such play he is hurting the other children and it is clear that he does not know how to make friends.
 - j) Ms Brusse was of the view that, given her experience as a teacher for more than 24 years, the level of anger K displays for a child of his age is abnormal and needs to be addressed through play therapy...'
- [43] Given the predictions of Raphael, Loebenstein, Yodaiken and Tudin (the only clinical psychologist experts) the concerns expressed by K's teacher – who is entirely independent – must be taken seriously. While it is accepted that there is no expert assessment available as to the cause of K's behavioural problems, it is not difficult to infer that the perpetual, intractable conflict between his parents is starting to impact negatively and seriously on his psychological and emotional development, more particularly when regard is had to the absence of any other factor which might have caused this.
- [44] According to all of the experts, K is loved and otherwise well cared for by both his parents and has never been diagnosed with any disorder which could account for this behaviour. It thus seems reasonable to accept that, as he develops, he is becoming more aware of his parents' dysfunctional relationship. By all accounts, there is also no discernible hope of that dysfunctional relationship ever normalising.

Discussion

- [45] Where a court sits as upper guardian of a minor child, there is no onus in the conventional sense.[1] What is required is to take an overall view of the situation in order to determine whether the decision of the parent who wishes to relocate is a reasonable one. This involves a weighing up of all relevant considerations:

'[2] It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a Court will not likely refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be bona fide and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts...'[2]

- [46] As Maya AJA (as she then was) put it in *F v F*[3]:

'[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 that "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 are intertwined with those of S" did not deserve "any attention" and that "[i]n arriving at a just decision [a Court] cannot be held hostage to the feelings of aggrieved litigants".

[47] The paramountcy principle enshrined in s 28 of the Constitution does not mean that every relocation case must be approached from the position only of the child. Nor will the child's best interests always trump all other rights. The Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)*[4] confirmed that:

'[25] ...This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of s 28(2)...

[26] This court, far from holding that s 28 acts as an overbearing and unrealistic trump of other rights, has declared that the best-interests injunction is capable of limitation... Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.'

[48] There is little doubt that, if asked, K would express the wish to maintain frequent contact with the father. However what also has to be weighed into the mix are the following important considerations.

[49] First, K has the right to develop in an environment free of continuous conflict between his parents, one in which, particularly as he grows older, he will not be forced to have to choose loyalty to one parent over the other.

[50] Second, he has the right to have his primary attachment figure, his mother, free from the anxiety which has permeated her life since at least his birth. Although Raphael expressed the view in 2015 that, despite her symptoms, the mother was managing more than adequately in all areas of her life, another three years of more entrenched conflict has since passed. It is simply unacceptable for this court to expect the mother to continue to face and cope with the father's aggression, hostility and lack of insight into his role in all of this for the next 13 years. As Yodaiken and Tudin pointed out, her rigidity is her way of coping with that aggression. She internalises it. It is fair to accept that she will reach breaking point.

[51] Third, despite her rigidity, the father was unable to point to a single objective instance where the mother in fact deprived him of contact with K. Both Cawood and the Family Advocate expressed concern about the risk of alienation. To my mind, the best indicator for future conduct is past conduct. Somehow the mother has managed, despite the conflict, to foster the bond between K and the father to the point where his own appointed expert as well as the Family Counsellor confirm a secure attachment. Logic dictates

that if the father's complaints of deprivation of contact and parental alienation had true substance, such an attachment would not have been possible.

[52] Fourth, Cawood's answer to the problem is to dismiss the clinical opinions of Yodaiken and Tudin, finding their main reason in favour of relocation to be '...without foundation and ... the least important reason for recommending the enormous trauma of father-son separation'. She proposes rather revising the parenting plan contained in the settlement agreement to confer greater rights on the father and more contact with K.

[53] She was criticised, with justification, for providing an expert opinion in a matter where, it turned out, she has previously provided the father with advice on his ongoing disputes with the mother. This may have coloured her views, and has undoubtedly called her objectivity into question. However, Cawood herself acknowledges that her own proposed solution will in itself be fraught with difficulty. This much is evident from one of her concluding paragraphs:

'It appears that, due to the ongoing power struggles between the parents, facilitation/mediation has not been successful. I recommend that the Court appoint a Parent Plan Manager who shall ensure that the renegotiated Parent Plan should be adhered to by both parents.'

[54] Cawood thus appreciates that, without ongoing intervention, any parent plan between the parties is simply not going to work.

[55] Fifth, the Family Advocate's proposed solution is that, while supporting the YT opinion of entrenched intractable conflict, this could be addressed by (a) K attending play therapy; (b) the parties attending an intensive parenting program; and

(c) each undergoing individual therapy; and that:

'Because facilitation in the past has proven to be ineffective therefore the parents need to learn to take control of the inter-parental

communication and will need to make use of their individual therapist's support and intensive educational parenting program

to embrace their parenting regime.'

[56] In similar vein, the Family Advocate suggests that the parties' communication 'guidelines' be addressed through their respective therapists and not with each other, nor through K or any other forum such as his school or the South African Police. Email communications should

be terminated and the parties should only engage with each other by way of short text messages in relation to contact. With due respect to the Family Advocate, it is my view that what is proposed is wholly unrealistic, particularly when regard is had to the fact that this will have to continue for a number of years to come. Moreover, during argument Ms De Jager, the Family Advocate concerned, conceded that neither she nor the Family Counsellor had researched the nature or efficacy of the proposed therapeutic interventions and stated that their recommendations had been made in what she termed ‘...a desperate attempt to find the least detrimental alternative’ to a relocation.

- [57] Sixth, it is evident from the Family Counsellor’s report that she misconstrued the fundamental cause of the conflict. She assessed its source as relating to disagreement about the exercise of parental responsibilities and rights, going so far as to state that ‘...the mother feels that the father only has specific parental responsibilities and rights’ [my emphasis], whereas most of the conflict has been caused by the father not respecting the fact that he agreed to relinquish those rights which he might have had in December 2015. This misapprehension seems to have given rise to the Family Counsellor’s concern about future frustration of contact in the event of a relocation, and has been exacerbated by what is a misunderstanding between herself and the mother in relation to proposed contact post-relocation. In fact, as the Family Counsellor records, the father’s primary objection to the relocation is ‘...the mother’s history of refusal to allow him to be involved in the care of K...’ and that she should not be allowed to relocate without these allegations being properly addressed.
- [58] Taking all of these considerations into account, it is my view that the mother’s reasons for wishing to relocate are bona fide and are certainly not unreasonable. There are no compelling reasons to override her decision and the bond between K and his father is now such that it should withstand their separation.
- [59] The practicalities of the intended relocation are detailed in the papers and thus need not be repeated. I merely highlight that the mother is currently employed on a freelance basis for the same company that has already interviewed her for a position in its Amsterdam office at a remuneration package of between €80 000 to €90 000 per annum. This position will permit her to work from home with the support of her nuclear family nearby. K has a Dutch passport, is already fluent in the language and has been enrolled at a school attended by one of his cousins with whom he already has a relationship. The mother seeks no maintenance from the father following their relocation.
- [60] It cannot, of course, be guaranteed that the mother will facilitate contact after relocation, and the court can only do its best to put safeguards in place. The mother’s legal representatives were accordingly requested to investigate and provide information on available dispute resolution mechanisms as well as the recognition in the Netherlands of any order that this court might make. This information was obtained and incorporated in a draft order prepared by the mother’s legal representatives which was made available after the conclusion of argument. I shall make an order in terms of the draft, subject to certain

amendments which are apparent therefrom.

[61] The mother's counsel argued strongly for a costs order in her favour. However, given the nature of the matter and the particular history of the parties' relationship, I am of the view that it is not appropriate to make such an order.

Conclusion

[62] In the result the following order is made:

1. The applicant is authorised to remove the minor child permanently from the Republic of South Africa for the purpose of relocating to the Netherlands on the terms set out in Annexure "A" hereto ('the Order').
2. There shall be no order as to costs.

J I CLOETE

For applicant: Adv Stan Van Embden

Instructed by: Smith Tabata Buchanan Boyes (S Volks)

For respondent: Mirshaene Muller

Instructed by: Leon Frank Attorneys (N Klein)

[1] Shawzin v Laufer 1968 (4) SA 657 (A) at 662H-663A; B v S 1995 (3) SA 571 (AD) at 584I-585A and 585D-E; M v M (15986/2016) [2018] ZAGPJHC4 (22 January 2018) at para [24].

[2] Jackson v Jackson 2002 (2) SA 303 (SCA).

[3] 2006

(3) SA 42 (SCA).

[4]

[2007] ZACC 18; 2008

(3) SA 232 (CC) at paras [25] and [26].

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