

SOUTH AFRICA / JUDGMENT

M.K v A.J.K (11407/2023) [2025] ZAWCHC 288 (7 July 2025)

[2025] ZAWCHC 288

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

11407/2023

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FLYNOTES: FAMILY – Children – Relocation – Best interests of child amid conflicting expert recommendations – Risks of international relocation without enforceable safeguards – Experts recommend that child remain in South Africa – Family Advocate’s report recommending child’s return to Qatar – Limited investigation and failure to address key concerns – Relocating child to Qatar without enforceable safeguards would pose significant risks – Child to remain in mother’s care in South Africa pending divorce.

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 11407/2023

In the matter between:

M[...] K[]

Applicant

and

A[...] J[...] K[]

Respondent

JUDGMENT DELIVERED ON 7 JULY 2025

VAN ZYL AJ:

Introduction

1. These are cases in which the law cannot offer a resolution, but where it acts as a crutch until the parties settle their differences to such an extent that life can continue somewhat normally. This is such a case. The one aspect that all the professionals involved in the matter agree upon is that the parties, individually, are good and loving parents. The parties themselves hardly agree upon anything.
2. The parties, with their minor son L[...], used to reside together in Doha, Qatar. The applicant instituted divorce proceedings[1] in this Court on 13 July 2023 after the respondent had advised her on 10 May 2023 that he wanted a divorce. The main issue in the divorce action is the care and contact arrangements in respect of L[...]. The remaining issues are the calculation of the accrual claim, and the extent of the respondent's maintenance obligations in respect of the applicant and L[...].
3. During July 2023 the applicant launched an urgent application in which she sought, as Part A, an order granting her (together with ancillary relief) leave to travel with L[...] to South Africa from Bali, Indonesia, on 19 July 2023. The application was opposed, but after hearing argument an order was granted on 17 July 2023 allowing the applicant to travel to South Africa with L[...]. The respondent's consent was dispensed with.
4. The parties did agree, and it was so ordered, that Dr Astrid Martalas would be appointed to carry out an investigation and compile a report setting out her findings and recommendations regarding the relief sought in Part B of the applicant's application, namely that the minor child remain in the applicant's care in South Africa, subject to the respondent's rights of reasonable contact, pending the finalisation of the pending divorce action.[2] Part B of the application was postponed for hearing on 23 August 2023.
5. The respondent refers to Part B of the application as a relocation application, while the applicant emphasises the interim nature thereof. Practically, the situation contains elements of both, especially given the progress of the litigation over the ensuing months which resulted in L[...] having been in South Africa for more than a year and a half at this stage. Ultimately, however, it will be up to the trial court determining the divorce action to direct where L[...] should reside after the parties' divorce.
6. Dr Martalas had not yet completed her report during August 2023, and the application was thus postponed to 3 November 2023. On that day, the hearing did not proceed because Dr Martalas' report had still not been finalised. The report was received on 3 December 2023, whereafter the parties agreed to the terms of a postponement order which was granted on 7 December 2023. In terms of the agreed December 2023 order, Part B of the relief sought was yet again postponed, on this occasion to 5 June 2024. Certain limited issues were postponed for hearing on 6 February 2024, pending the final hearing of Part B, namely the necessity or terms of a mirror order to be confirmed in Doha; whether the holiday contact takes place in

South Africa or Doha or elsewhere; and the percentage of holiday contact to be exercised by the respondent pending the hearing on 5 June 2024 (the applicant having objected to Dr Martalas' 70%/30% holiday split recommendation contained in her report).

7. Contact provisions were made in the agreed order regarding the respondent's contact with L[...], which was to be exercised in Cape Town as well as electronically. The order stipulated that regular contact should be exercised, unsupervised, and contact was provided for in respect of the extended family on both sides which was to be encouraged through regular contact. Provision was also made for contact between L[...] and Ms D[...], the parties' housekeeper in Qatar to whom L[...] seems to be quite attached.[3] Provisions were also agreed to on aspects of therapy for L[...] and the parties, L[...]’s school arrangements, his dog, Flippie, and the appointment of a further expert by the respondent, who did not agree with Dr Martalas' recommendations.
8. The limited issues referred to in paragraph 6 above were eventually not argued on 6 February 2024. At the time, the respondent requested leave for L[...] to travel with "his" appointed expert, Mr Terry Dowdall, to Doha for purposes of an assessment there. Such leave was refused, essentially because there was no mirror order in place. An order granted by agreement on 23 February 2024 provided that the limited issues were postponed for hearing together with Part B of the relief sought. The Family

Advocate was requested to conduct an investigation into L[...]’s best interests in relation to the limited issues. I return to these later in this judgment.

9. Because of the psychological and medical assessment provided for in the agreed 7 December 2023 order, as well as the Family Advocate's report, not yet having been finalized, the matter was postponed to 12 December 2024. The Family Advocate delivered a comprehensive report in the late afternoon of 11 December 2024, and the applicant sought a postponement properly to consider it. The parties thus agreed that the hearing would take place on Tuesday, 4 February 2025.
10. There are many recriminations to and fro between the parties, and much time is spent on the papers on blame, justification, and outrage. Their relationship has clearly broken down completely.[4] Regarding the urgent application, for example, the respondent criticises the applicant for the manner in which it was brought,

saying that it was effectively an underhand way to obtain a relocation order of a permanent nature, possession being nine tenths

of the law. When the applicant went to Bali, she already had no intention of returning to Qatar with L[...], despite having given an undertaking that she would do so. The applicant, on the other hand, accuses the respondent of emotional and physical abuse, and of threatening to have her arrested and deported from Qatar. She said that she feared him, and no longer trusted him. She also suspected him of being unfaithful to her in his relationship with Ms D[...], their housekeeper in Doha, in respect of whom it was said that she regarded herself as L[...]’s mother.

11. Be that as it may, the parties are the authors of their own situation, and they must accept the consequences that arise therefrom. I have no intention of laying blame on either side, but shall instead consider the recommendations made in respect of L[...] by the various expert witnesses who have been involved with this matter over the past months. I do so mindful of the fact that the conclusion that I come to is an interim one, as the final arbiter of where L[...] is to reside will be the court determining the divorce action.
12. The circumstances are such that L[...] will necessarily reside with one or the other of the parties, far removed from each other in terms of locality. In *Godbeer v Godbeer*[5] the Court stated that, in the normal course, it would be in children's best interests to reside with both parents in a loving family. Where, however, parties decided to live their lives separately, an anticipated consequence must be that their lives would take different paths and that this may impact on children having regular and ready contact to both parents.[6] This is the case in the present matter.

Background:

the common cause facts

13. I briefly mention the material facts in this matter that are common cause. The parties, who are both South African citizens, were married[7] on 2 April 2005 in South Africa. L[...] was born on 3 October 2014 in South Africa, and is currently 10 years old. Both parties' families live in South Africa.
14. The parties moved to Qatar during 2016 as the respondent obtained employment there. L[...] therefore resided there for about seven years prior to July 2023. As the respondent's counsel puts it: "It is not disputed that at this time [that is, when the urgent application was launched], L[...], then 8 years old, had been living in Qatar where the parties relocated to some seven years prior, Qatar having been L[...]’s habitual place of residence at the time."
15. The applicant did not work since the parties' relocation to Qatar, and was mainly responsible for L[...]’s care. She had the assistance of a housekeeper, Ms D[...]. At present, in South Africa, the applicant is working on a part-time basis for her sister and is available personally to care for L[...].
16. The respondent told the applicant that he wanted a divorce on 10 May 2023. The applicant returned to South Africa thereafter, during July 2023, and resides here with L[...] with the leave of this Court.
17. The respondent still lives in Doha and is employed as a radar air traffic control supervisor at Hamad International Airport on a contract basis. On his version, he earns 66 000 Qatari Riyals per month (approximately R323 000.00 per month).[8]
18. The respondent's work is demanding, and he will require additional staff to care for L[...], even during holiday periods. Ms D[...] will only be able to live with the respondent in Doha if he is granted sole custody of L[...]. According to Dr Martalas, whose report will be discussed

below, Ms D[...] advised her that “according to the Ministry of the Interior in Qatar if A[...] has sole custody of L[...], she can still stay in their home and sleep over” . The situation appears to be that this will only be possible if a female relative also resides with the respondent and Ms D[...] in the respondent’s home.

19. L[...] has been living in South Africa since 19 July 2023. He is attending school at H[...] I[...] (he is currently in year 5 or grade 5), and attends various sports and extra-mural activities, including tennis and tennis league, piano and guitar lessons. He has recently been selected as a leader in the local boys’ scouts. L[...] receives therapy from educational psychologist Ms Thea Coetzee on an ongoing basis.
20. The applicant’s residency in Doha has since been cancelled, and L[...] is no longer enrolled in any school there.
21. Qatar is a non-Hague country. In terms of Qatari-law, male children are automatically placed in the care of their fathers from age. There is no record of cases where a child retained in Qatar has been successfully returned to a custodian parent. It appears from the Family Advocate’s report, as well as a legal opinion obtained by Dr Martalas from an advocate at the Cape Bar experienced in family law, that the question of the enforceability of South African orders in Qatar has not yet been clarified.
22. The parties’ divorce action is dragging along at a snail’s pace (there are yet again accusations to and fro in relation to the conduct of the litigation) and at the time of the hearing of this application the matter was not yet ready for trial.

The expert evidence on record

23. There is contradictory expert opinion on record from the various witnesses who investigated L[...]’s circumstances. There is no dispute between the parties that these witnesses are suitably qualified to express their opinions on the matter at hand. Their respective conclusions are the bone of contention. The Court is therefore faced with having to evaluate competing expert accounts, and then making a determination on the basis of one such opinion.
24. In *Geldenhuys v Minister of Safety and Security and another*[9] the Court remarked as follows in relation to conflicting expert opinion:

“As the Court noted in R v Morela 1947

- (3) SA 147 (A) at 153:

'But the Court or the jury, in cases of the present kind, has not the special training to enable to act on its own opinion; it really decides whether it can safely accept the expert's opinion.'

Where in a case such as the present when the experts differ, the Court must decide which of the competing experts is the most credible.

There are dicta which provide some assistance in the determination of which expert to prefer in this case. In *S v*

Gouws 1967

(4) SA 527 (E) at 528D the Court said that:

"The prime function of an expert seems to me to be to guide the court to a correct decision on questions falling within his specialised field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried."

25. I turn to consider the opinions on record. The papers are voluminous and it is impossible to address every aspect arising from the reports. My ultimate assessment is necessarily somewhat robust, particularly in light of the fact that the approach that I prefer will, given the nature of the relief sought, be a temporary arrangement.

Dr Astrid Martalas, counselling psychologist

26. As indicated earlier, when the urgent application was argued the parties agreed that Dr Martalas would be appointed to carry out an investigation and compile a report setting out her findings and recommendations regarding L[...]’s primary care pending the divorce.

27. Dr Martalas made various recommendations in her report delivered on 4 December

2023. She concluded that L[...] should remain in the applicant’s primary care in Cape Town until he was old enough to make an informed choice. She further recommended that, should the Court agree to L[...]’s relocation to Cape Town, the respondent would have a choice whether to exercise holiday contact in South Africa, Doha, or elsewhere, and that a mirror order should be put in place in Doha. Such holiday contact should, in her view, be exercised in such a way that L[...] should spend 70% of his holidays with the respondent.

28. The respondent, in a supplementary affidavit dated 5 December 2023, stated that he did not accept the recommendations of the jointly appointed expert. He requested an order that Part B of the application be dismissed, and that the Court should direct that L[...] is to return to reside in Doha subject to certain tendered contact for the applicant.

29. The respondent requested in the alternative that he be granted leave to appoint a further expert to investigate L[...]’s relocation, and that pending the postponement date:

“11.3.1 I will immediately take all such steps so as to make this interim order a mirror order in Doha and that I provide proof hereof to the Applicant;

11.3.2 That I be entitled to exercise contact with L[...] in Doha over the upcoming vacation from 10 December 2023 to 10 January 2024 for purposes whereof L[...] shall be accompanied by me during all flights;

11.3.3 That I be entitled to exercise contact with L[...] in South Africa or Doha for 70% of the March/April 2024 school holiday;

11.3.4 That the aforementioned contact only be exercised outside of the Republic of South Africa subject thereto that I deposit an amount of R200 000,00 into my attorney of record's trust account, to be released to the Applicant in the event of me not returning with L[...] to South Africa on the date as determined and further subject to me providing the Applicant prior to L[...]’s departure with copies of his return air tickets (and my own) and a full itinerary and contact details for L[...] for the duration of his stay with me.”

30. The Court therefore had to determine the necessity or terms of a mirror order to be confirmed in Doha, and whether holiday contact should take place in South Africa, Doha or elsewhere. These were the limited issues referred to earlier.[10]
31. In an affidavit delivered on 5 February 2024, the respondent abandoned the relief claimed in his affidavit dated 5 December 2023 and instead requested an order that L[...] may leave the jurisdiction of South Africa without a mirror or similar order being in place, for the purposes of a five-day assessment by Mr Terry Dowdall in Doha. Mr Dowell had been appointed by the respondent to assess L[...]’s circumstances. The relief sought was opposed, because the applicant expressed fears that the respondent would not return L[...] to South Africa in the absence of a formal safeguard obliging him to do so. The parties agreed to argue the issue on 12 February 2024.
32. Dr Martalas delivered an affidavit dated 7 February 2024 in which she explained that her recommendation regarding holiday contact in Doha was intended to be subject to a mirror order or similar order being in place. She confirmed that she was of the view that the applicant’s fear that the respondent would not return L[...]

was a reasonable one, and that such a risk existed. She stated this upon consideration of further information that had come to light after her assessment, and also retrospectively having regard to what had been told to her during her assessment. Dr Martalas relied, further, on a legal opinion obtained from a practising advocate. The opinion indicated that, should the father retain the child in Qatar, the mother would be obliged to institute proceedings in a competent court in Qatar, whose laws differ significantly from those of South Africa. The court in Qatar would apply Sharia law, although it could depart therefrom. Only a Qatari lawyer would be able to provide definitive insight in this regard. There is a dispute between the parties as to the value of the opinion, but the fact remains that the precise nature of the parties’ legal position in Qatar is anything but clear.

33. On 10 February 2024, the office of the Family Advocate delivered a report on the necessity and terms of a mirror order, since Qatar is not a signatory of the Hague Convention on 10 February 2024. It was recommended that the issues set down for hearing on 12 February 2024 should stand over until more information was available regarding the enforceability of orders in Qatar. It was further recommended that contact only takes places in South Africa in the interim.

34. On 23 February 2024, the respondent's application for permission to take L[...] to Qatar at any time prior to the hearing on 5 June 2024 in the absence of a mirror order was dismissed.
35. Dr Martalas conducted a follow-up assessment, and in a report compiled in November 2024 she criticised both parents for the ongoing acrimony of which L[...] is acutely aware, and their inability to accept responsibility for their roles in the current levels of acrimony.
36. Dr Martalas dealt with L[...]’s “voice”, that is, the expression of his views and wishes, which included feedback from his therapist, Ms Coetzee, and his teacher, stating that he is coping well at school but now also has a tutor which has given him more confidence. At school he often refers to Qatar but does not talk about going back there. He has made friends

at school and at Scouts. A smash-and-grab incident that occurred soon after his arrival in South Africa had a lasting impression on L[...], and has made him feel unsafe. He does express positive views about his living conditions in a gated community whilst in the applicant's care. Dr Martalas mentions that L[...] has admitted to wanting to run away from home because his parents are fighting, and because the applicant “drives him mad”. According to Dr Martalas, L[...] struggles with what he regards as the applicant's controlling behaviour. L[...] indicated that he wants to live with the respondent; however, if the applicant “could chill”, then he would want to live with her. He clearly rebelled against the discipline enforced by the applicant.

37. Dr Martalas confirmed that her recommendations made in December 2023 remain, save that, if the respondent comes to Cape Town even on short notice, his contact with L[...] should be given preference to other arrangements, save where those involves school activities, medical or other therapeutic interventions, in which case the respondent should be involved. She made further recommendations relating to therapy for the parties, L[...]’s belongings (should he remain in Cape Town) and the facilitation of telephonic and video contact between the respondent and L[...].
38. The respondent does not accept Dr Martalas' recommendations. He is of the view that she has given insufficient attention to various aspects, including L[...]’s views, the fact that L[...]

has resided in Doha for most of his life, the social conditions in South Africa, and the applicant's situation should she return to Qatar to live and work there and thus enable L[...] to have equal contact with both parents. There may be some merit in these and various of the other aspects that the respondent raises but, as appears from what is set out further below, I think that the overall and holistic approach taken by Dr Martalas in her assessment of the situation is the better one.

Mr Terry Dowdall, clinical psychologist

39. Dr Martalas was originally jointly appointed by the parties and provided a first report, a subsequent affidavit, and an updated report. The respondent, not being satisfied that the recommendations made by Dr Martalas served L[...]’s best interests, employed the services of clinical psychologist, Mr Terry Dowdall.

40. Mr Dowdall delivered a report on 11 July 2024. His recommendation, after visiting the respondent in Doha (in L[...]’s absence) and conducting a care and contact investigation and psychometric testing with L [...], was that “L[...] should remain in his mother’s primary care in the Western Cape for the next four years until June 2028.” Thereafter there should be a presumption that L [...], in conjunction with the Parent Plan Manager, can complete his high school in Doha, beginning in the first year of high school in September 2028, unless there are compelling reasons to the contrary.
41. Whilst L[...] is living primarily in South Africa, he should be permitted one of the short vacations with the applicant, and up to 70% of the remaining school holidays with the respondent. Contact should be able to be exercised in South Africa, Doha,[11] and any other country that is a signatory to the Hague Convention. Legal provisions including mirror orders should be put in place where appropriate, to safeguard L[...] against any irregular retention. Mr Dowdall recommends private telephonic and video calls between L[...] and the respondent on four days per week.
42. These recommendations are made notwithstanding that L[...] during two private sessions with Mr Dowdall indicated that he would prefer to be in Doha with his father. Although L[...] was careful mostly not to compare his parents, his closer affinity has been developed with the respondent. Mr Dowdall also details L[...] complaining about the applicant lying to him in various ways, saying that if his dad takes him out of the country, he will never see the applicant again, the applicant saying that the respondent is breaking the rules, saying that he will be arrested, telling L[...] all these lies to make him stay here, generally expressing that he does not like his life which is “messed up” and “not fair”. According to Mr Dowdall, pursuant
- to certain tests that were administered L[...]’s position has not changed in that his primary affiliation is with his father, to some extent because he experiences the respondent as the more “fun” parent.
43. Although cautious about labelling the applicant a gate-keeper, Mr Dowdall mentions that the situation where one parent arrives from another country to visit for a few days only to that find playdates, extra-mural events, non-urgent medical appointments, or something else has been inserted into the space in such a way as to erode time with the child, is concerning. That this has happened on occasion cannot be denied. The applicant provides explanations, but the situation is of course not satisfactory.

It does, however, appear from the papers that the respondent has had ample contact with L [...], and that time that may have been lost on one occasion was made up on another.

44. On balance, however, L[...] experiences living in the applicant's care in a broadly positive way. According to Mr Dowdall, the overall picture regarding L[...]’s emotional connection with each of his parents shows that L[...] has a close underlying bond with both parents. He concludes that both parties are “good enough parents” (the normative standard), and they are both invested in L[...]’s life and his future.
45. Mr Dowdall regarded it as important that the family environment in which L[...] grew up in Doha no longer exists. At this time, he is of the view that the loss of the underlying structure that the applicant is experienced in providing would be prejudicial to L[...]. The respondent has an issue with availability in his ten-day altering work cycle, has a challenging job with a high workload, high stakes and high stress, and his natural inclination would often be to do so something convivial with L[...] rather than managing homework or keeping to functional routines. Life with the applicant, on the other hand, provides much-needed routine and structure.
46. The respondent does not accept Mr Dowdall’s recommendation, and insists that L[...] should be returned to Doha pending the determination of the divorce action. He states that Mr Dowdall failed to attach sufficient weight to a number of facts and factors, including the fact that L[...] grew up in Doha and has formed a clear attachment with the environment, that he expressed the preference to be with his father rather than his mother (who is the stricter parent), and the issues of safety, living in a first-world country rather than a third-world country, access to other countries and travel, free schooling, and free medical care.

Ms Thea Coetzee, educational psychologist

47. Ms Coetzee was not briefed to give an opinion on where L[...] should reside pending the finalisation of the parties’ divorce. She is, however, a qualified educational psychologist, and has been

L[...]’s therapist since his arrival in Cape Town.

48. Ms Coetzee provided a feedback report on 28 November 2024 due to her concerns regarding the respondent’s insistence that L[...] should be returned to Doha and live with him. She remarks:[12]

“I am concerned that L[...]’s opinions are not always his own, and are influenced by Mr K[...], as L[...] has indicated to me before his interaction with some of the professionals, that he knows exactly what he is going to say. I am therefore concerned that he has been “coached” before each of his sessions to indicate that he wants to remain in the care of his father. It is clear from objective drawings, therapeutic exercises and general, casual conversation in L[...]’s therapy session that he is in fact very happy in South Africa with his mother, in the house that they share, with his 2 dogs. He has many friends in school, also at his scouts and friends that he has made that are children of his mother’s friends. He speaks of happy outings to the beach, shopping and his grandparents. His views that he then voices to the professionals are the complete opposite of the picture that is constituted in his therapy sessions, and the question can therefore legitimately be asked whether it is L[...]’s own opinions that are voiced, or those of his father. Up to the middle of October 2024, L[...] had daily telephone conversations with his

father, therefore daily contact was taking place wherein L[...] could be influenced.”

49. The respondent is critical about the fact that Ms Coetzee provided a report at all, saying that in so doing she acted outside of her mandate. It appears from the Family Advocate’s report that the respondent views Ms Coetzee’s report as biased and one-sided. It is so that Ms Coetzee was not tasked with furnishing an opinion to this Court in relation to where L[...] should reside in the interim. I do however not regard her input as attempting to do this. She places on record her observations of L[...]’s conduct and conversations during sessions, and one cannot brush her concerns aside. The Court was referred during argument to an example of the respondent’s alleged “coaching”

of L[...], pressing L[...] to state that he would prefer to live in Doha with the respondent. I get the impression that some

pressure is probably also being applied by the applicant and her family, given the current ill-feeling between the parties. The situation is concerning, especially as L[...] clearly feels guilty and conflicted. He regards the parties’ divorce as his fault. It does not help that the parties’ families on both sides seem to take an active part in the battle, and thus that L[...] relationship with his grandparents on either side is also being compromised.

Dr David Swingler, psychiatrist

50. Dr Swingler’s involvement shone light on the parties’ relationship at present rather than on where L[...] is better off in the interim. The applicant has throughout the application raised concerns regarding the respondent’s psychological health, describing him as sometimes “zoning out”, stating that it looks as if he is in a trance, and that he sometimes becomes unresponsive, implying that L[...] would be unsafe in his presence. The issue was raised in correspondence between the parties’ attorneys, and Dr Martalas referred in her report to the applicant’s expressed concerns
51. Dr Swingler was accordingly appointed to assess the situation. He points out that the applicant and her family allege mental illness on the respondent’s part, but that there is no other credible evidence to support this notion. The witnesses to the respondent’s alleged illness the respondent’s co-workers, persons at his church, and his housekeeper have never done so. None of the experts (Mr Dowdall, Dr Martalas, or the office of the Family Advocate) conducting assessments have witnessed this.
52. Dr Swingler states that it is highly unlikely that the respondent would have an eighth-year accident-free driving record in Doha, or the career trajectory that he has had in a highly stressful work environment, were he experiencing seizures. He expressed the view that further investigation into this issue would be expensive, delaying proceedings and adding nothing apart from the risk of muddying the waters.

53. It follows that no weight is to be attached to the applicant's expressed fears in relation to the respondent's mental status insofar his capability to care for L[...] is concerned. I have already mentioned that the parties – flaws and all – are both good parents. At present, however, they are so frustrated

with each other that every tiny imperfection is blown out of proportion. They are both guilty of this. One can only

hope that they realise sooner rather than later that the intense animosity between them is harmful to L[...]. I have already

mentioned that Dr Martalas, too, has raised serious concerns about the damage the parties are causing to L[...] in involving him in their conflict.

The Family Advocate's office[13]

54. On 11 December 2024, the Family Advocate's office delivered their reports. Mr Oersen of that office recommended, after meeting with L[...] on two occasions, that L[...] should be placed in the care of his father in Qatar. He recommended further that the applicant should enjoy reasonable contact with L[...], that a mirror order should be obtained within three months after judgment,[14] and that the primary care position of L[...] should be reviewed by the Family Advocate in January 2026.

55. Notwithstanding both Dr Martalas and Mr Dowdall recommending that at least in the interim L[...] should remain living in Cape Town, the respondent believes that their recommendations do not serve L[...]’s best interests. He therefore seeks relief in accordance with the Family Advocate’s report.

56. Having considered the report, however, I agree with counsel for the applicant’s submission that the recommendations contained therein – in particular to the effect that L[...] should return to Doha in the interim - cannot be accepted as being in L[...]’s best interests. Various concerns arise in relation to the report.

57. Mr Oersen spent just over two hours with L[...] and his family, unlike the other experts who had spent considerably more time getting to know the stage and the cast of characters. It appears from Mr Oersen’s report that he did, for example, not know where L[...] and his family lived, but relied simply on what L[...] had told him in this respect – which was incorrect.[15]

58. He relied on information provided to him by the respondent without obtaining the applicant’s response to the allegations made against her and her family. This related, for example, to allegations that the applicant had “unilaterally” removed L[...] from the respondent’s care, and that the applicant had an attitude “not to promote and facilitate contact” between the respondent and L[...]. A particular concern was raised about the attitude of the applicant in making contact between L[...] and the respondent difficult, but this was not addressed with the applicant herself. In this regard and in relation to L[...]’s

relationship with the respondent, Mr Oersen did not consider that the respondent and his family have had ample access to and contact with L[...] since the latter's return to South Africa, and that L[...] and the respondent have managed to retain a very strong bond despite the physical distance.

59. According to the Family Advocate's office, L[...] will benefit from being allowed to return to Doha to reside with the respondent as he will be given the opportunity to continue with the lifestyle he was accustomed to before having been removed therefrom. L[...] will return to a familiar home, school and social network, and will have continuity in his education by resuming his education at his previous school, minimising a disruption in his academic progress. He will enjoy social benefits by being able to reconnect with friends and peers. The problem with this approach is the specific school and social structures that L[...]

left in July 2023 are no longer in place as far as he is concerned. Too much time has passed. He will not be able automatically to resume life as he knew it there. The idea is a welcoming one, but the practical reality is different.

60. Mr Oersen did not contact L[...]’s teachers, his friends, or his therapist, Ms Coetzee, to obtain their views. It is unclear whether he considered that the other experts all raised their concerns that L[...]’s tells untruths, and that he vacillates as to where he wants reside because he is caught in the middle of the parties’ unpleasant ongoing litigation. Notably, Mr Oersen seems to have given little consideration to the fact that both Ms Martalas and Mr Dowdall found that L[...]’s expressed wish (which changes from to time) to live in Doha cannot be the determining factor, as he is caught in the middle of the conflict, and has told untruths on various occasions. In fact, the Family Advocate’s report places great emphasis on L[...]’s wish to reside with his father.
61. L[...]’s preferences must of course be considered. Section 10 of the Children’s Act 38 of 2005 provides as follows: “Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”
62. Section 31(1)(a) of the Children’s Act states, in turn: “Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b)[16] involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child’s age, maturity and stage of development”.
63. These provisions envisage that children should not only be listened to but also given an opportunity to participate in proceedings which affect them. The question that arises is what weight[17] is to be attached to the concept of the voice of the child, and how to incorporate a child’s stated preferences when deciding

issues pertaining to such child. A further issue is how a child's voice should be ascertained and recorded to enable the court to make decisions in its capacity as upper guardian of the child. Where minor children are concerned, their voices are usually placed before the court by their parents, third parties such as social workers or therapists appointed by one or both of their parents, by way of the appointment of legal practitioners in terms of section 29(6) of the Children's Act, by the appointment of curators ad litem in the High Court, or by way of expert assessments. The facts of every matter concerning the well-being of children are different, and the views and wishes of the children who are involved are necessarily influenced by those varied circumstances.[18]

64. In the present matter the Court has the benefit of experienced expert witnesses who have conducted thorough investigations, and have heard and observed L[...] over an extended period. Dr Martalas, Mr Dowdall,

and Ms Coetzee indicate that reliance, for various reasons, cannot be placed upon what L[...] reports as his wish, namely to stay with his father. I have referred to some of the concerns raised. L[...] has, for example, taken to telling the parties what he thinks they want to hear. He gets angry with the applicant for being strict with him. The context of his situation as a whole needs to be considered. Dr Martalas and Mr Dowdall are both of the view that L[...] should remain in the care of his mother in South Africa (to that, one adds the observations of Ms Coetzee, L[...]’s therapist, who has spent much time with him). These experts cannot be criticised as being biased, as Dr Martalas was a joint appointment proposed by the respondent, and Mr Dowdall was appointed by the respondent himself after he had refused to accept Dr Martalas’ recommendations.

65. L[...]’s emotional and psychological state is clearly fragile at present. I am inclined to accept the recommendations by Dr Martalas and Mr Dowdall to the effect that L[...] should remain in South Africa pending the finalisation of the divorce action, despite the respondent’s contentions to the contrary. Returning him

to Doha would mean that he would have to reside there without his mother, who is his primary caregiver, and without the constant

support of his father, who works hard and for long hours, in a compound with a caregiver, whilst there is a dispute regarding his

relocation which can only be determined by a trial court. Depending on what the trial court decides, L[...] might have to be returned to South Africa again in a few months’ time. L[...] is in a safe and loving environment in South Africa, despite the social and economic issues difficulties that may exist here as opposed to Qatar.

66. It cannot be ignored that life as L[...] knew it in Qatar no longer exists for him. Considering Ms Coetzee’s input, L[...] is happy at school, takes part in extramural activities, and have made friends. Stability in the interim would probably be more valuable to L[...]’s well-being than passing him from the applicant to the respondent for an interim period now that he seems to have settled somewhat in his not-so-new environment.

67. Whilst the office of the Family Advocate often play an important role in family law matters, their resources are limited. As indicated, Mr Oersen spent less than 3 hours with this family. He conducted no investigations, and did not consult with the professionals already on board. In these circumstances, it is hard to understand on what basis he could have come to a different opinion than that stated by the experts. He tenders no explanation for this in his report. I am, in the circumstances, not inclined to follow his recommendation.
68. I did consider having a conversation with L[...] to hear what his views were in respect of the situation. Having thought about it, however, I considered that L[...] had been subjected to repeated assessments over the past months, to the point where he was clearly exasperated by the situation. His views are on record. It would be unfair to subject him to yet another interview where he might feel yet again feel that he had to choose between his parents.

Contact pending the finalisation of the divorce action

69. The office of the Family Advocate previously recommended that the issue of whether contact between Logal and the respondent should take place in Qatar, and the enforceability of this Court's orders in Qatar, stand over until it has been properly investigated. In light thereof that Qatar is not a party to the Hague Convention, the obtaining of a mirror order is recommended, as it will provide additional security for L[...]’s prompt return to South Africa at the designated time. The Family Advocate further recommended that pending the Court's determination of these issues, the respondent's contact with L[...] should be exercised in South Africa.
70. The applicant believes that the respondent will retain L[...] in Qatar if he is allowed to exercise contact there. The respondent has, on the applicant's version, threatened on various occasions that L[...] will not be returned to South Africa. The respondent still regards Qatar as L[...]’s place of habitual residence, and is adamant that it is in L[...]’s best interest to live in Qatar, without his mother, to whom he offers contact over holiday period. He says that the applicant was not in all respects primarily responsible for L[...]’s care while the parties were cohabiting, given the presence of Ms D [...], the housekeeper. L[...] would therefore not be so significantly impacted by a separation from his mother. Dr Martalas reports, however, that Ms D[...] informed her that she, as housekeeper, attended to limited care duties as far as L[...] was concerned.

The applicant did the lion's share.

71. If the respondent does retain L[...] in Qatar, the likelihood of the applicant being able to secure his return is slim. She does not have sufficient funds (even though she has in the meantime secured employment in South Africa), and she no longer has a residency permit for Qatar. It seems from the parties' endeavours as set out in the papers that is very difficult to obtain the relevant legal advice and assistance in Qatar itself. As matters stand, no one knows what must be stated in the mirror or similar order to make it enforceable in Qatar and how the applicant can enforce it in a Qatari court, and at what cost. The respondent has also made enquiries there, but has not divulged what he has learnt. It seems that he is

himself not daunted by the possibility of litigation there: in his answering affidavit that “Had I wanted to have Shariah law implemented, I would have approached the courts in Doha when it first became apparent a divorce action was inevitable”.

72. The respondent submits that the applicant’s fears that he will retain the minor child are unreasonable. Dr Martalas, Mr Dowdall, and the office of the Family Advocate have nevertheless all recommended

that mirror or similar orders be put in place prior to any contact being exercised outside South Africa. No such order is

currently in place.

73. I agree with the applicant that there are risks involved in allowing the respondent to take L[...] to Qatar for contact. As indicated, the respondent believes that Qatar is L[...]’s place of habitual residency. There does not appear to be strong ties between the respondent and South Africa - there is a dispute regarding the respondent’s relationship with his family in South Africa. According to the applicant they have never been close, and have hardly played any role in the lives of the parties or L[...] over the years. The value of the assets jointly owned by the parties in South Africa is negligible in comparison with the respondent’s gratuity fund and income in Qatar. The applicant’s accrual claim in the divorce action potentially amounts to the bulk of the value of the assets in South Africa.
74. Parental child abduction is real and well documented, and provisions the Hague Convention on the Civil Aspects of International Child Abduction, 1980[19] are now incorporated in the Children’s Act. It is common cause that Qatar is not a contracting party to the Hague Convention, and no order is in place in Qatar. Although the respondent has consented to the jurisdiction of this Court for purposes of the divorce action, he persists that Qatar is L[...]’s place of habitual residence. The jurisdictional factor of “habitual residence” is undefined in the Convention, and must be determined on the facts of every matter.[20] The respondent may well argue, once L[...] is in Qatar, that he should remain there as it is his habitual place of residence. The respondent earns a good income in Doha whilst the applicant was unemployed for nine years. She is reliant on the respondent for maintenance. She litigates with the assistance of loans from her family. The respondent knows that the applicant does not have the funds to litigate in Qatar.
75. There is of course no crystal ball to predict that the respondent would in fact be irresponsible by ignoring the parties’ arrangements, whether inter se or by court order, once he has L[...] with him in Qatar. The current relationship between the parties (with the families on each “side”) is however exceedingly strained, bordering at times on childishness. When confronted, for example, with the applicant’s sister’s statement under oath that L[...] advised her that the respondent had told him that he (L[...]) would never have to return to South Africa, the respondent replied that she had lied as she still holds a grudge against him because he did not respond to her advances 18 years ago. I am of the view that allowing L[...] to leave South Africa in

the interim in these circumstances and in the absence of a mirror order in Qatar would be to light a match next to a box of fireworks.

Conclusion

76. I am, in the circumstances, of the view that the interim position as it has pertained since July 2023 should remain pending the determination of the parties' divorce action. This is preferable to a return to Doha which might be eventually again be undone by the trial court. There is no ordinary onus in matters where children are concerned and I have therefore considered the papers holistically.[21] The parties cannot live together, and they seem unable to communicate with each other, but they share a child to whom they are both devoted. In my view, the focus in this application should shift from the ongoing disputes between the applicant and the respondent, with which the papers are replete, to what is in L[...]’s best interests. The Court is assisted in this regard by the expert reports obtained by the parties.
77. The applicant, as L[...]’s mother, co-guardian and holder of parental rights and responsibilities, has always been L[...]’s primary caregiver, given that the respondent was and is the primary breadwinner, employed in an admittedly stressful and taxing position. Given the reports of Dr Martalas, Mr Dowdall, and Ms Coetzee, there can be no doubt that to order L[...]’s return to Doha in the interim, separating him from his mother, school, friends, family, pets, and therapist, and given his fragile emotional state, would be irresponsible. This is not because the respondent is not a good father, but rather because on the evidence a semblance of stability for the moment is better for L[...] than an upheaval now and perhaps again in the future when the divorce action is finalised.
78. As to contact, I intend accepting Dr Martalas’ suggested recommendation that the respondent spend 70% of L[...]’s holidays with him, in South Africa. Once there is a mirror order in place, this issue of whether L[...] may travel to Doha for contact with the respondent may be revisited – this is after all an interim arrangement.
79. The parties have each provided me with a suggested draft order. I have considered both drafts, and set out below the order finally handed down.

Costs

80. It is trite that, as a general rule, the party who succeeds should be awarded costs. With regard to costs in matters involving the interests of minor children, it has been held that where both parties are of the view that their contention is correct and what they wanted to do was in the interest of the child, the court will not easily award costs to one of the parties. [22]

81. The issue of costs was hotly disputed, with the applicant - who was admittedly successful with the relief sought in the application – seeks punitive a costs order against the respondent. The applicant argues that the various postponements (save for the postponement on 12 December 2024) leading up to the final argument of the application were all caused by the respondent not accepting the recommendations of the experts recommended and appointed by him. He refused the settle the litigation despite

the recommendations of Dr Martalas, Mr Dowdall and Ms Coetzee, and persisted, at great cost to the applicant and L[...], with this

interim litigation over a period of almost two years.

82. I agree that the respondent has shown a “winning at any cost” attitude, no doubt borne of the animosity that exists between him and the applicant at this stage. I cannot, however, find that he is uncaring as far as L[...] is concerned –

it seems that the respondent is genuinely, if misguidedly, of the view that L[...] would be better off in Doha in the interim. I am therefore not inclined to grant costs on a punitive scale.

83. I do think that the respondent should nevertheless bear the costs of the application (excluding the costs of the postponement on 12 December 2024) on the scale as between party and party. The parties both employed senior junior counsel, and the matter is of great importance to them. In the exercise of my discretion under Rule 67A I intend directing that counsel’s fees be taxed on Scale C.

Order

84. In the circumstances, I grant the following order:

The minor child, L[...] K[...] (“L[...]”), shall remain in the care of the applicant and within the jurisdiction of this Court, pending the outcome of the divorce action instituted under case number 11407/2023.

The respondent shall, pending the finalisation of the divorce action, have contact with L[...] in South Africa, as follows:

- a. For 70 % of every school holiday.
- b. Whenever the respondent is able to travel to Cape Town even on short notice (save that it shall not be not less than 72 hours’ notice) during school terms, he shall be entitled to exercise reasonable contact with L[...], which should be given preference to other arrangements save in respect of school and sport activities in which L[...] partake, and scheduled therapy sessions, in which case the respondent shall be entitled to be involved in such activities. In the event of the applicant giving the respondent at least 14 days’ notice of her intended plans to go away with L[...] (provided that he has not already given notice of an intended visit), the respondent’s contact shall not get preference above such arrangement, provided further that the applicant shall not be entitled to raise such plans as a bar to

contact on short notice to the respondent more than once a month.

- c. The respondent shall be entitled to exercise regular Skype / electronic / face time contact with L[...], four times a week on Tuesdays, Thursdays, Saturdays, and Sundays between 19h00 and 19h30 (or such other time as may be agreed between them), which contact shall be exercised unsupervised (the applicant shall be entitled to exercise contact on the same basis when L[...] is with the respondent).

In the event of the parties being unable to reach agreement regarding dates and times pertaining to the respondent's contact, such dispute shall be referred for mediation.

The respondent is ordered to pay the costs of the applicant in this application, including the costs of the respondent's

counter-application and the postponements on 7 December 2023 and 7 February 2024 on the scale as between party and party, with

counsel's fees to be taxed on Scale C. No order is made as to the costs of the postponement on 12 December 2024.

P. S. VAN ZYL

Acting Judge of the High Court

Appearances:

For the applicant:

Ms A. de Wet, instructed by Brand & Robberts Attorneys

For the respondent:

Ms A. Heese, instructed by Bill Tolken Hendrikse Incorporated

[1] By way of substituted service.

[2] All questions of costs stood over for determination as part of Part B.

[3] According to Dr Martalas (whose report will be discussed in due course), Ms David describes her duties as cleaning the house, assisting with looking after L[...] (including helping with homework and babysitting when required), and taking care of the family pets.

[4] It appears from the record that there is by now bad blood between the parties' parents as well, which does not assist the situation.

[5] 2000

(3) SA 976 (W) at 981J-982B. See also B v M [2006] 3 All SA 109 (W) paras 156-158; and F v F 2006

(3) SA 42 (SCA) at 498B-D.

[6] In the minority judgment in Jackson v Jackson 2002

(2) SA 303 (SCA) para 48. Cloete AJA indicated that, from a constitutional perspective, the rights of the custodian parent to pursue his or her own life or career involved fundamental rights to dignity, privacy, and freedom of movement. He stated that thwarting a custodian parent in the exercise of such rights may well have a severe impact on the welfare of the child or children involved.

[7] Out of community of property, with the application of the accrual system.

[8] The applicant remarks that no information in relation to the respondent's bonuses and overseas bank accounts have yet been

furnished. This will no doubt be addressed in the divorce action.

[9] 2002

(4) SA 719 (C) at 732B-E. See also Michael and Another v Linksfield Park Clinic (Pty) Ltd and another 2001 (3) SA 1188 (SCA) paras 34-40 in relation to the general approach to expert evidence: what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning.

[10] In para 6 above.

[11] Qatar is not a signatory to the Hague Convention.

[12] The emphasis is the Court's.

[13] In Soller NO v G and another 2003

(5) SA 430 (W) para 22 the purpose and role of the office of the Family Advocate is described as follows: “.. the Family Advocate, as required by legislation, reports to the court on the facts which are found to exist and makes recommendations based on professional experience. In so doing the Family Advocate acts as an advisor to the court and perhaps as a mediator between the family who has been investigated and the court.”

[14] The report refers to “this dispute”, which I understand to mean the present application.

[15] It appears that L[...] told Mr Oerson that he and the applicant lived with L[...]’s maternal grandparents, which was not the case by the time the Family Advocate’s office was conducting its investigation.

[16] Section 31(1)(b): provides that: “A decision referred to in paragraph (a) is any decision- (i) in connection with a matter listed in section 18 (3) (c); (ii) affecting contact between the child and a co-holder of parental responsibilities and rights; (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.”

[16] Section 31(1)(b): provides that: “A decision referred to in paragraph (a) is any decision-

(i) in connection with a matter listed in section 18 (3) (c);

(ii) affecting contact between the child and a co-holder of parental responsibilities and rights;

(iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or

(iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.”

[17] Generally accepted factors to consider when measuring the weight to be attached to the expressed wishes of a child include the age and maturity of the child, the capacity of the child to make reasoned decisions, the level of intellectual and emotional functioning of the child, the nature of the child's relationship with each parent, and whether the child is vulnerable to parental pressures.

[18] The High Court has, for that reason, wide powers to call for and obtain relevant information to enable it to exercise its discretion,

without being hamstrung by stringent rules in matters concerning the best interest of minor children: *Terblanche v Terblanche* 1992

(1) SA 501 (W) at 504C.

[19] The principal objects of the Hague Convention, as set out in Article 1 thereof, are to secure the prompt return of children wrongfully

removed to or retained in any contracting state and to ensure that rights of custody and of access under the law of one contracting

state are effectively respected in the other contracting state.

[20] *Senior Family Advocate, Cape Town v Houtman* 2004

(6) SA 274 (C) para 11.

[21] See *C v P* [2008] ZAGPHC 258 (21 August 2008) at para [9]: “The incapacity or otherwise of a parent litigant to discharge an evidentiary onus should not be conclusive as to what may or may not be in the best interests of the child. What is required is that the court acquires an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the court must render a finding of mixed fact and opinion, in the final analysis a structured value judgment, about what it considers will be in the best interests of the child.”

[22] See *AC v KC* [2008] ZAGPHC 369 (16 June 2008) para 16.

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