

SOUTH AFRICA / JUDGMENT

N.N v S.M.A (093796/2023) [2024] ZAGPPHC 504 (24 May 2024)

[2024] ZAGPPHC 504**COURT**

North Gauteng High Court, Pretoria

BEFORE

Retief

CASE / FILE NUMBER

093796/2023

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Source record**FLYNOTES:**

FAMILY – Children – Relocation

– With

father to Cameroon – Mother passed away after father returned to Cameroon alone – Child has been supported by

uncle – Voice of the child – Child loves his father

but has feelings of abandonment – Applicant has demonstrated

his ability to care for child's needs and to provide him with home – Granted primary care and permission to relocate

child to Cameroon – Father must first undergoes parental guidance and, together with the minor, undergo attachment therapy.

SAFLII

Note: Certain

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

Policy

IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION,

PRETORIA)

Case No. 093796/2023

Children's Court

Case No. 14/1/4-143/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS

JUDGES: NO

(3) REVISED

SIGNATURE:

DATE: 24 MAY 2024

In the matter between:

N[...]

N[...]

Applicant

and

S[...]

M[...] A[...]

Respondent

This judgment is

prepared and authored by the Judge whose name is reflected as such,

and is handed down electronically by circulation

to the parties /

their legal representatives by email and by uploading it to the

electronic file of this matter on CaseLines. The

date for handing

down is deemed to be 24 May 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] By way of an apt description, this matter centres around the application and enquiry into the best interest and needs of N[...] S[...] E[...] N[...] [S[...]], an eight (8) year old little boy. The lens through which this Court gains insight into his needs

and interest was through his very own which was recorded when he was already 6 years old. At 6, S[...] during a fantasy test called the Little Bird test, the purpose of which is to determine a child's inner insecurities and how they experience parental support, S[...] stated to the social worker, Ms T Du Plooy [Du Plooy], that “ - the Little Bird waited.” From the facts in this matter, which will become clearer that “The Little Bird” may have been waiting for the applicant, his biological and only living parent, to bring this very application.

[2] The applicant, S[...]’s father, brings this application, in essence it appears, to fortify and complete his legal journey in respect of his son. To fortify an order he already obtained in the Children’s Court that all parental rights and responsibilities of S[...] vest with him by way of declaratory relief and, to complete his rights by requesting this Court to award primary residency and care to him. The applicant lives in Cameroon and as such, the Children’s Court lacked the necessary jurisdiction to entertain care and residency associated with relocation as the Children’s Court as this aspect is not statutorily catered for in section 45 and 46 of the Children’s Act 38 of 2005 [Children’s Act]. In the interim the Children’s Court ordered that S[...] stay in the temporary care of the respondent, S[...]’s uncle.

- [3] This Court is now asked to make a final determination, the respondent filing no counterclaim to establish any rights nor claim against the applicant and as such, he seeks no relief in respect of S[...] but has opposed this application.
- [4] The thrust of the respondent opposition is an attack on the reliability of a report filed by Ms TJJ Phago [Phago], a social worker (report reference CMRN040/2021), relying on the report by Du Plooy dated 22 November 2021 (report reference CMRN082/2022) to expose the applicant's failure of adhering to any of her recommendations and lastly, his concern for S[...]’s well-being in a foreign country where he is unsure of the applicant’s financial ability to provide for S[...] in circumstances when the respondent does not know the applicant’s family.
- [5] To determine S[...]’s immediate needs this Court does so by considering the report of Du Plooy, the content of which is common cause as no dispute of content nor recommendation has been raised on the papers and both the applicant and the respondent rely on her recommendations albeit, in different ways. In consequence, there is no need to deal with the evidentiary weight of Phago’s report which appears contentious. This Court, foreseeing the consequences thereof and wishing to hear S[...]’s voice to discern his needs, sought the assistance of Adv Steenkamp from Legal aid. Adv Steenkamp was, with leave of this Court, and without opposition, appointed as S[...]’s ‘voice of the child’.
- [6] As in most matters, the factual background giving rise to the answers to the questions posed of: why the applicant’s needed to bring this application and why S[...] does not live with him, is essential.

BACKGROUND

FACTS

- [7] The applicant moved to South Africa in 2002 to study for a master’s degree in forced migration. It was during this time that the applicant started a relationship with S[...]’s mother, Ms E[...] N[...] L[...] A[...] [the deceased]. It is common cause that as a result of that relationship S[...] was born on 9 November 2015. At that time the deceased and the applicant lived together and raised S[...] together. In 2017 the applicant’s work permit expired, which work permit was not renewed by the South African Department of Home Affairs. He was forced to return to Cameroon alone. Whilst in Cameroon, the applicant started his own communication company, supported the deceased and S[...]. In 2019 the relationship between the deceased and the applicant soured and they broke up.

- [8] On 20 December 2020, the deceased passed away and S[...] moved into his deceased mother's maternal family home, the respondent's home. The respondent has financially maintained S[...] in the applicant's absence. The applicant making certain contributions only. The applicant has returned to South Africa for the deceased's funeral, S[...]’s birthday and for Court appearances and assessments as required.
- [9] In 2021, not long after the deceased's death, the applicant approached the Children's Court to establish and enforce his parental rights and responsibilities and to request that the primary care and S[...]’s residency be with him. Residence translating into S[...]’s relocation to Cameroon, with a prospect of the United States of America. The applicant allegedly frustrated by his inability to communicate with his own son.

A GENERAL ANALYSIS

- [10] Each matter is case specific. This matter is no different and its uniqueness simply lies in the consideration of 3 (three) aspects. The recurring voice through the papers, albeit on the common facts relied on, S[...]’s voice and what is not on the papers which a Court in applying the best interest right expects to see and what its absence demonstrates.

What is the recurring voice?

- [11] The applicant's voice is clear on in the papers and appears to be the same as that voiced in the Children's Court. He wants to take care of his son, he wants to have his son grow up in his home and he wants to ensure that the respondent and his family play a pivotal role in S[...]’s life. This he made known legally soon after the deceased's death. In the interim he alleges the right to see, talk and contact his son have been frustrated by the respondent and his family.
- [12] The respondent appears to concede that S[...] should be reunited with the applicant but that it's about the timing. The concession clear from this own opposition and from Du Plooy's report.
- [13] To illustrate, the respondent in opposition relies on Du Plooy's recommendations to demonstrate and expose the applicant's failure to initiate and action those recommendation asked of the applicant. In doing so, the respondent records, verbatim, at paragraph 4.7 of his answering affidavit, Du Plooy's recommendations on page 14 of her report. Du Plooy, inter alia, also recommends that S[...] reunite with the applicant in Cameroon and in so doing, considers what must be done, inter alia, “- before S[...] leaves to live with his father.....” Furthermore, she recommends “yearly visits with his maternal family and regular contact with them must continue”. The latter is the same relief sought by the applicant in this application. In consequence the respondent does not actually oppose the reunification and relocation of S[...] save for conditions as will appear later.

- [14] Du Plooy expressed her voice too through her assessments and interactional assessment in 2021. In her report she recorded that S[...] never referred to his uncle, the respondent, during the assessment and that the respondent's sister-in-law, X[...], and not the respondent, was S[...]’s primary caregiver.
- [15] This is in contrast when she recorded that S[...] included his father in the inner circle of his world and drew a line from himself to his father stating he will take his father with him to the moon. “S[...] identified as the child hugging his father and feeling happy. He perceives him as a father figure, but rejects an anxiety avoidant attachment with him, experiencing that emotional needs are not being met by him”. The Little Bird is waiting.

S[...]’s voice

- [16] In trying to establish what S[...]’s voice after Du Plooy’s 2021 the Court heard it through Adv Steenkamp who stated that, he wanted to reunite with his father but indicated a hesitation at this moment. S[...]’s voice still in line with Du

Plooy’s observations in 2021, still in line with the respondent’s save with his condition triggers and in line with

the applicant’s insistence that his son must and wants to be reunited with him.

- [17] Of significance this triggers the next enquiry, how long should the Little bird wait? This is the question this Court will answer in his best interest.
- [18] In exercising the Court’s wide discretion, S[...]’s well-being is considered and, as a starting point, Du Plooy’s assessment is of great assistance not only for its insight but that its content is undisputed and, the fact that the assessment was done at the end of 2021 has not diluted S[...]’s voice presently.
- [19] She states that S[...] voiced in 2021 already, voiced that he misses his father, he loves his father but he feels almost abandoned emotionally and physically by him because he left him behind after his mother’s death when he returned back to Cameroon without him. His present hesitation seen in context and as a result, not much has changed since 2021. Therefore, this Court places weight on Du Plooy’s depiction of S[...] as a sad, unhappy child who feels rejected by his deceased mother and father and is resentful of the fact that his mother has given him to his aunt X[...] and, that the respondent other than taking care of financial needs, plays not parenting pivotal role in his life.
- [20] The time trigger referred to by the respondent’s counsel in argument and not on the papers was that the integration between the applicant and S[...] should take place over twelve to twenty-four months appears not to be in his best interest on the papers. S[...] needs love and security as soon as possible. He must not be left to wait too long.

What was absent from the application?

[21] Although the applicant in his founding papers did not attach an updated authenticated social economic evaluation from the delegation of social affairs, Cameroon, he so in reply. Its content was not objected to from the bar nor in argument by the respondent's Counsel and as such this Court has relied on its content which speaks favourable of the applicants social and economic standing. Importantly it confirms that following the revelations made the Director of the United Nations Information center in South Africa

and their own investigations they formulated a new authentic report for the applicant. In short, the respondent's family in an alleged unlawful manner jettisoned the applicants first authenticated report. This unsavoury turn of events cast unnecessary doubt on Phago's report in 2021. The domino effect is the delay of S[...] being reunited, in his own interest with the applicant. Phago recommendations in favour of the applicant.

[22] This Court accepts that the applicant has demonstrated his ability to care for S[...]’s needs and to provide him with a home and that he has already secured a place at a school in Cameroon for S[...] to attend should he so relocate. This should relay the respondent's fears and opposition on this ground to rest. This Court too notes the respondent's demand in argument that should the applicant be successful he will require financial reimbursement of the maintenance he paid in favour of S[...] on the applicant's behalf. No such relief is before this Court and in the premises non considered.

[23] However, what remains absent from the respondent's answering affidavit is any mention about what actions he has taken to become an important figure in S[...]’s life to change the portrayal of him as recorded by Du Plooy. He does not even mention that he loves him or that he will miss him if he leaves to live with his father in Cameroon. In fact, there was no counter relief to

establish any form of legal interest in S[...] care before this Court.

[24] Lastly, a matter of concern and a factor is that the respondent's papers fail to raise the voice of X[...], who factually cares for S[...], no “mother's voice” whatsoever, no supporting affidavit nor confirmatory affidavit for that matter, expressing anything, not even her own fears relating to him reuniting with his father and her need to stay in contact with

him. In contrast in the applicant's relief he prays for the needs of the respondent's family to be considered in S[...]’s

best interest.

[25] This Court has placed reliance on Adv Steenkamp's concerns relating to the fact that Cameroon is not a signatory to the Hague Convention. This is a concern as a factor but not a bar for the relief. The applicant confirmed that should this Court grant him the relief he seeks he will obtain an ex parte mirror order in Cameroon at his own expense. Adv Steenekamp nor the respondent's Counsel objected thereto.

[26] Having regard to all the evidence to discern the needs and interest of S[...], and applying section 28 of the Constitution of South African this Court exercises its discretion in favour of the applicant. Having said that this Court too considers the time triggers of the respondent, as well as the inability of the respondent to act as S[...]'s guardian during such time, the respondent's family needs to remain in contact with S[...], the applicant and S[...]'s need to reunite with the assistance of a social worker here in South Africa and Adv Steenkamp's recommendations pertaining to the commencement of School terms in Cameroon is noted with thanks. Prayer 4 to be done before the new school term starts in Cameroon in September 2024 and to be continued in Cameroon if so indicated.

[27] In consequence, the following order follows:

1. The applicant is awarded full parental rights and responsibilities in respect of his minor son N[...] S[...] E[...] N[...] [the minor child].
2. Primary care of the minor child is awarded to the applicant, the minor child to permanently reside with the applicant.
3. The applicant is granted permission to relocate the minor child under his direct supervision and primary care to Cameroon.
4. The operation of Prayers 2 and 3 are suspended until the following has taken place:
 - 4.1 The applicant, at his own costs is ordered to, immediately after the date of this order undergo parental guidance regarding parent-child relationship attachment, discipline, and emotional needs of a child with and to the satisfaction of or with further direction from of Heske Sangster, a social worker, alternatively another social worker who becomes available immediately.
 - 4.2 The applicant, at his own cost, is ordered to, immediately after the date of this order to, together with the minor undergo attachment therapy with and to the satisfaction of or with further direction from Heske Sangster, a social worker, alternatively any another social worker who becomes available immediately.
5. The applicant and the respondent are, with the assistance of Advocate Steenekamp, ordered to conclude a contact plan and visitation program between the minor and the respondent and his family.
6. The applicant is to obtain a mirror order in Cameroon and at his own cost.
7. This order to be served on the Clerk of the Children's Court Pretoria North to ensure that it comes to the presiding magistrate before the 5 June 2024.
8. Each party to pay their own costs save for the wasted costs occasioned by the respondent's leave to oppose and opposition which is to be paid to the applicant on scale B.

L.A. RETIEF

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Appearances:

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