

SOUTH AFRICA / JUDGMENT

O.M v M.C (2022/031103) [2023] ZAGPJHC 254 (3 March 2023)

[2023] ZAGPJHC 254**COURT**

South Gauteng High Court, Johannesburg

BEFORE

F Bezuidenhout

CASE / FILE NUMBER

2022/031103

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER:2022/031103

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

03.03.23

In the matter between: -

OM Applicant and MC Respondent

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e mail and publication on CaseLines. The date and time for hand-down is deemed to be 14h00 on 3 March 2023.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] This application for the relocation of a minor child is unlike other applications of this nature. Usually, the relocation itself is heavily contested. In this matter however, the respondent father has at the outset conceded that a relocation to Australia with the applicant mother would be in the best interests of his 12 year old daughter. The bone of contention between the parties is rather the format and timing of the reunification process that must ensue in order to re-establish a relationship between father and daughter with the ultimate aim of facilitating a contact regime that would serve the minor child's best interests.

THE TENDERED CONTACT

- [2] When in Australia, the applicant tenders reasonable contact between father and daughter via electronic media which will include but not be limited to contact twice per week between 15:30 and 17:30 (Australia local time). According to the applicant's tender, the contact is subject to the minor child's expressed views and wishes and the recommendations of her current therapist, Ms Claire O'Mahony ("O'Mahony").
- [3] Shortly after the respondent filed his notice of intention to oppose the application and before he filed his answering affidavit, the respondent filed a without prejudice offer in terms of rule 34(1) of the Uniform Rules of Court ("the tender"). The respondent repeated the content of his tender in a draft order. The respondent seeks, amongst other relief, the intervention of an independent psychologist, Mr Leonard Carr ("Carr"), in order to advise the parties how to engage with each other regarding the minor child's best interests by constructing a parenting plan, how to prepare her for her intended emigration to Australia and to facilitate a meeting between the respondent and the minor child prior to her departure.
- [4] The respondent rejected the tender and so also the draft order.
- [5] Although the applicant acknowledges that a process of reunification between father and daughter is necessary, the applicant tells the court that the minor child is not comfortable in engaging with yet another psychologist and who is of the male gender at that. The applicant contends that O'Mahony should conduct the reunification process once the minor child has relocated.
- [6] To summarise, the parties do not see eye to eye on the following issues: -
- [6.1] Whether the reunification process must commence before or after the minor child's relocation;
- [6.2] Whether O'Mahony or Carr should conduct the reunification process.

- [7] Finally, as is always the case in matter of a litigious nature, the parties are unable to agree on the issue of costs of the application. The applicant avers that the respondent should pay the costs. The respondent seeks an order that each party shall pay their own costs, save for all costs subsequent to the receipt by the applicant of the respondent's with prejudice offer dated 28 November 2022.

ISSUES FOR

DETERMINATION

- [8] The court is accordingly called upon to determine the following issues: -
- [8.1] The commencement date of the reunification process and by whom it will be conducted;
- [8.2] Who should be liable to pay the costs of the application.

HISTORIC EVENTS IN A NUTSHELL

- [9] The applicant and the respondent met during
2003. The respondent's father had just passed away and the applicant's parents were in the midst of divorce proceedings. After a serious fallout with her mother midway through 2004, the applicant took up residence with the respondent, his mother and his sister. A romantic relationship developed between the applicant and the respondent developed during this time and from this relationship the minor child was born.
- [10] The relationship broke down during 2011 and in April of that year the applicant vacated the common home with the minor child.
- [11] The respondent's contact with the minor child was exercised sporadically. The applicant contributed this to the respondent's disinterest in the minor child while the respondent contends that the applicant has alienated him from his daughter.
- [12] I interject to mention that the parties both moved on with their romantic lives. The applicant engaged in another relationship and the respondent married and fathered two more children of his own and a stepson. Regrettably both relationships failed.
- [13] During mid-2011 the parties agreed to appoint Dr Ronel Duchon, a psychologist, to assist them in agreeing to age-appropriate contact between the respondent and the minor child. Dr Duchon recommended that the parties approach Ms Leoni Henig, a social worker in private practice, to establish and maintain contact between the respondent and the minor child. Ms Henig was never appointed.
- [14] During 2011 the respondent exercised contact with the minor child on 11 occasions and in 2012 the respondent spent an aggregate of 70 minutes with the minor child. Thereafter and during 2013 the respondent had no contact with the minor child and in 2014 he only visited her on 14 occasions.

- [15] In September 2013, the applicant launched an application in this court for leave to relocate to Australia with the minor child. It was her intention to study in Australia and to qualify there as a teacher. The respondent opposed the application and counter applied for unsupervised contact. The 2013 proceedings were never finalised, but an interim order was granted by His Lordship Mr Justice Makanya on 25 August 2015 in terms whereof Ms Melony Frankel, a psychologist, was appointed to facilitate, regulate and direct the respondent and the applicant regarding the rebuilding of a regular, age appropriate contact regime between the respondent and the minor child. This rebuilding process came to a grinding halt in November 2015. The respondent objected to Ms Frankel continuing with the process and terminated her mandate. The respondent explained that the process with Frankel was not successful due to Frankel's bias and her disregard of the alleged pre-existing parental alienation.
- [16] At the time the applicant decided not to proceed with the intended relocation and focused her time and energy on the minor child. She also decided to commence her studies in education in South Africa.
- [17] Neither party enrolled the 2013 proceedings again.
- [18] When the applicant graduated at the end of 2020, she decided that it would be in the minor child's best interests to relocate to Australia where the applicant's mother and sister reside. This was with a view of the minor child commencing her high school career in Australia, to obtain citizenship and the benefits of tertiary education that flow therefrom.
- [19] On the 5th of February 2021 the applicant addressed an email to the respondent requesting his consent. The respondent immediately indicated that a proposed relocation would be in the minor child's best interests. The respondent requested a meeting with the applicant in order to discuss certain issues, but the applicant did not accede to this request and insisted on the appointment of a mediator. The attempts to appoint a mediator and to commence a mediation process failed.
- [20] During July 2021, the applicant approached her present attorneys of record who addressed a letter to the respondent with the view of obtaining his consent for the relocation. The respondent consulted with his present attorneys who raised the issue of establishing contact between the respondent and his daughter. The respondent indicated that he would like to have contact with the minor child before and subsequent to the proposed relocation. In reply, the applicant recorded that the minor child was adamant that she wanted nothing to do with the respondent and that she was in therapy to assist her in dealing with abandonment issues arising from the respondent's failure to maintain contact with her.
- [21] The respondent requested to speak to the minor child's psychologist in an attempt to explore the best route to take regarding his relationship with the minor child. This request was directed towards the end of September 2021.

[22] During May 2022 the parties' legal representatives engaged in discussions regarding the appointment of an independent psychologist to assist the parties in resolving they impasse regarding the proposed relocation and the respondent's contact. Dr Davis-Schulman was agreed on. The parties met with Dr Davis Schulman on the 13th of June 2022. They agreed that Dr Davis Schulman would assist in attempting to rebuild the father-daughter relationship. On the 14th of June 2022 the respondent recorded via his attorneys that Dr Davis Schulman was not appropriate as she was not a neutral party in the matter. It turned out that Ms Davis-Shulman was compromised as she had acted as mediator in the respondent's former marriage.

[23] After the meeting on the 13th of June 2022, the applicant contacted O'Mahony with a view of assisting the minor child. O'Mahony confirmed on the 18th of August 2022 that her mandate was not to facilitate a reconciliation between the minor child and her father, but to create

a safe and contained therapeutic space for the minor child where her emotional attachment and psychological wellbeing could be ascertained in relation to how she perceived her relationship with her father. The minor child is currently still consulting O'Mahony and has formed a strong and trusting therapeutic bond with her.

[24] The respondent acknowledges that O'Mahony was appointed as the minor child's psychologist. He does not wish to change this position. What concerns him is that O'Mahony is led by the minor child's wishes, irrespective of whether there has been prior alienation. He also asserts that O'Mahony has preconceived ideas about the origin of the minor child's

psychological issues and is only willing to facilitate contact subject to certain subjective conditions. The respondent avers that

O'Mahony blocked his genuine attempt to present the minor child with a heartfelt video in order to revive their relationship. She suggested that a letter rather be addressed to the minor child which the respondent regarded as inappropriate and impersonal.

[25] The respondent complained that the applicant has over many years systematically and subtly prevented him from having a relationship with their daughter. He recorded that the applicant went as far as changing the minor child's surname to the applicant's maiden name without his knowledge and consent. He also told the court that much of the applicant's strategic parental alienation was dealt with in the 2013 proceedings where, amongst other relief, the applicant sought an order for the termination of the respondent's parental responsibilities and rights.

[26] After the termination of Frankel's mandate and after seeing the applicant's lack of commitment to the reunification process, the respondent states that he took a backseat as he did not wish to traumatise the minor child any further. It was his intention to re establish contact and secure the relationship which had been denied to him when the minor child had reached a slightly older age.

[27] The respondent contends that while he has no objection to the minor child relocating, he believes that it should not take place at the cost of forfeiting a relationship with him.

THE LAW

[28] The overriding and paramount consideration in matters like this, is always what is in the best interest of a child. This is what is required by both section 28(2) of the Constitution and section 9 of the Children's Act, 38 of 2005.

[29] The breadth of the procedural powers of a High Court sitting as upper guardian is well-known: -

"(T)he High Court sits as upper guardian in matters involving the best interests of the child (be it in custody matters or otherwise), and it has extremely wide powers in establishing what such best interests are. It is not bound by procedural structures or by the limitations of the evidence presented, or contentions advanced or not advanced, by respective parties."[1]

[30] In Terblanche[2], the court sitting as upper guardian stated as follows: -

"It has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by strictures or by the limitations of the evidence presented or contingents advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes."

[31] A similar position was held later by the court in P:[3] -

"I am bound in considering what is in the best interests of P, to take everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order."

[32] In the matter of D v P[4] the learned Judge said

"The courts as upper guardians of minors have the daunting task in deciding the destiny of minors when their parents, either due to their own actions or due to particular circumstances forced upon them, cannot agree on what would be in the best interests of the minor children. More than often, the parents tend to see the best interests of their children through their own self cantered

interests, and then pose those interests as being that of the minor child. Rightly or wrongly, that is life. It does, however, impose a greater duty upon the court to determine what the best interests of the minor child are."

CHAMBER INTERVIEW WITH THE MINOR CHILD

- [33] In order to fulfil the duties imposed on me in terms of section 6(5) of the Children's Act and as Upper Guardian, I conducted a chamber interview with the minor child in the presence of my Registrar. I needed a sense of the emotional position of the minor child insofar as it relates to the imminent relocation, the prospect of rebuilding a relationship with her father and the process to be followed to achieve this.

DELIBERATION

- [34] It is fairly widely accepted and entrenched in our law that both parents' involvement is the key to providing a child with greater opportunities to find her own path to success. A secure and healthy attachment to both parents nurtures the physical, emotional and social development of a child. Healthy parent involvement and intervention in the child's day-to-day life lays the foundation for developing happy and content relationships with others in the child's adult life.
- [35] Reunification therapy is a form of family therapy, which can take many forms. Reunification therapy is specifically intended to reunite the child with the parent or parents with whom the bond has been broken. While reunification therapy is intended to rehabilitate and repair fractured relationships, it may not be an easy road to navigate.
- [36] The primary goal of this type of therapy is to reestablish trust between the parent and child. Hence allowing therapy to progress at the child's pace is essential. Reunification work can be long-term. When reunification is court-ordered following a breakdown in the relationship between the parents, it often includes co-parenting work in addition to parent-child sessions.
- [37] Because reunification is often recommended (or mandated) due to a rupture in a parent-child relationship, interventions often focus on fostering strong attachment. This can range from facilitating a conversation about a past argument to simply playing a game together and having a positive interaction.[5] For these reasons, I am of the view that in order for reunification to be effective, it cannot occur remotely as suggested by the applicant. A time limitation cannot be placed on it either and is wholly dependent on the child and those experts who will be guiding the parties and their minor daughter through this process.
- [38] In my view it would be improper for O'Mahony to fulfil both the role of therapist for the child and reunification expert. Moreover, it may irreparably compromise the relationship of trust that currently exists between the minor child and her therapist. The minor has to enter the reunification process knowing that she has someone like O'Mahony in her corner. Any other approach would cause unnecessary discomfort to the child and would only delay the reunification process or render it completely ineffective.

COSTS

- [39] I have no doubt that both these parents love their daughter very much. This is demonstrated by the amount of time and legal costs that they have spent in order to reach this point.

[40] The court has great appreciation for the applicant's angst and her need to protect the minor child from harm. The respondent's desire to repair his relationship with his daughter is similarly commendable. However, both parties could have gone about it in any very different way. Neither of them pursued the 2013 proceedings, which is a reasonable expectation especially after the reunification process with Frankel was aborted. Had they done so, the court could have effectively assisted the parties in crafting a workable alternative.

[41] I am therefore not inclined to grant costs in favour of either of the parties. This is my discretion and I have exercised it by taking in to consideration all relevant factors.

ORDER

In the circumstances I make the following order: -

"1. The applicant and the respondent shall retain full parental responsibilities and rights of the minor child, a female born on the [...] with South African identity number [...] ('the minor child'), including guardianship.

2. The applicant is authorised and permitted to remove the minor child, permanently from the Republic of South Africa and to relocate with her to Australia, subject to paragraph 6 of this Order.

3. The respondent is directed to sign any and all documents and do all things necessary to assist the applicant in obtaining the minor child's South African and German passports as well as the required permits and visa for the minor child's departure from South Africa and her entry into Australia within three (3) days of being requested to do so.

4. In the event of the respondent failing to comply with all the necessary requirements set out in paragraph 2 of this order: -

4.1. the respondent's signature shall be dispensed with and only the signature of the applicant shall be necessary on the applications for passports and/or visas and/or permits, as the case may be;

4.2. the applicant is authorised to sign all necessary documentation required to enable the applicant to remove the minor child permanently from the Republic of South Africa and relocate to Australia, including the Parental Consent Letter otherwise required to remove the minor child from the Republic of South Africa.

5. With effect from the minor child's arrival in Australia: -

5.1. the minor child's primary residence and care shall continue vesting with the applicant;

5.2. the respondent shall continue contributing towards the minor child's maintenance needs as set out in the order granted by the Randburg Maintenance Court on the 11th of February 2016;

5.3. the minor child shall continue to consult with psychologist Claire O'Mahony ("O'Mahony") for purposes of therapeutic intervention pending and after her relocation.

6. Before the minor child's departure from South Africa, the parties shall attend a meeting with an independent clinical psychologist who shall be mandated to: -

6.1. advise the parties on how to engage with one another and how to co-parent in the minor child's best interests;

6.2. advise on how to prepare the minor child for her intended emigration to Australia with the assistance of O'Mahony;

6.3. facilitate, with the assistance of O'Mahony, a meeting between the minor child and the respondent prior to her departure from South Africa;

6.4. assist the parties in constructing a parenting plan to be implemented and made an order of court in both South Africa and Australia;

6.5. continue to consult with the parties and the minor child after the applicant and the minor child's departure from South Africa in order to monitor the reunification process and in order to advise the parties as to when it would be appropriate for the respondent to visit the minor child in Australia.

7. The independent psychologist shall be of the female gender and shall be nominated by the current chairperson of the Gauteng Family Law Forum, within 7 (seven) days of this Order being served on her.

8. The mandate of the independent psychologist shall not be restricted in any way and she will be in contact with O'Mahony, and any other persons she deems necessary. The independent psychologist must be an expert in parental alienation and be available to start immediately.

9. The costs occasioned by the appointment of the independent psychologist and the construction of the foreshadowed parenting plan shall be borne by the respondent.

10. The applicant shall continue to make payment of the minor child's therapeutic sessions with O'Mahony. Upon the minor child's arrival in Australia, the applicant shall at her cost take whatever steps are necessary to provide counselling for the minor child by a suitably qualified counsellor or psychologist to assist the minor child with adapting to her new circumstances in Australia.

11. The applicant shall provide the respondent with any and all reports regarding the minor child's counselling. The respondent shall be entitled to contact the duly appointed psychologist in Australia directly.

12. The applicant shall within seven (7) days of receipt thereof, forward the following to the respondent: -

12.1. Details in respect of all relevant telephone numbers and addresses of the minor child's home and school, the applicant's employer and at least one other family friend to be contacted in the case of an emergency. The applicant shall update any personal information in the event of change;

12.2. All documentation pertaining to the minor child's educational progress, including reports;

12.3. Any medical certificates or reports of any nature in respect of the minor child.

13. The applicant shall keep the respondent advised regarding all aspects of the minor child's physical and emotional wellbeing and shall inform the respondent immediately should the minor child become ill or require major medical treatment.

14. The applicant shall inform the respondent of the minor child's involvement in all academic, sporting and cultural extramural activities and the respondent shall be entitled to contact inter alia the minor child's teachers and/or coaches directly.

15. Each party shall pay their own costs."

F BEZUIDENHOUT

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 1 March 2023

DATE OF JUDGMENT: 3 March 2023

APPEARANCES:

On behalf of applicant: Adv K Howard Kerryhoward1023@gmail.com Instructed by: Warrender Attorneys admin@warrenderlaw.co.za. On behalf of respondent: Adv L Silberg silbergsecretary@gmail.com Instructed by: Roy Suttner Attorneys roysuttlaw@legalcom.co.za

[1] Mpofu v Minister for Justice and Constitutional Development and Others (Centre for Child Law as amicus curiae) 2013 (9) BCLR 1072 (GG) at paragraph 64, quoted Kotze v Kotze 2003

(3) SA 628 (T).

[2] Terblanche v Terblanche 1992

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

[3] P and Another v P and Another 2002

(6) SA 105 (N) at 110C-D.

[4] D v P (82527/2016)

[2016] ZAGPPHC 1078 (15 December 2016)

[5] Reunification: Definition, Techniques, and Efficacy (verywellmind.com)

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