

SOUTH AFRICA / JUDGMENT

TH v AT (12091 / 2021) [2022] ZAWCHC 124 (14 June 2022)

[2022] ZAWCHC 124

COURT

Western Cape High Court, Cape Town

BEFORE

E D Wille

CASE / FILE NUMBER

12091 / 2021

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 12091 / 2021

In the matter between:

TH

Applicant

and

AT

Respondent

Coram: Wille, J

Heard: 24th of May 2022

Order: 27th May 2022

Reasons

Requested: 2nd of June 2022

Reasons

Delivered: 14th June of 2022

REASONS

WILLE, J:

- [1] This is a very peculiar ‘application for reasons’ at the instance of the respondent. I say peculiar because the respondent’s attorney has filed what seems to be a ‘vanilla’ application for reasons in terms of the court rules applicable in the lower courts. The respondent requests a written ‘judgment’

forming part of the record ‘showing’ the following, namely;

‘(1) The facts he found to be proved; and

(2) The reasons for the Order; and

(3) His reasons for the order of cost’(sic).

- [2] It is very difficult (if not impossible) to understand the ‘application’ piloted by the respondent’s attorney. I do not understand why the respondent’s attorney did not proceed in terms of the Uniform Rules of Court. The application is also curious in view of the fact that no case was made out for the opposition to the interdict to prevent the relocation threatened by the respondent and this was to some extent initially conceded by the respondent. (this concession was later retracted).

- [3] The matter was extensively argued before me on the 24th of May 2022 and after due consideration (in view of some urgency), I handed down an order on the 27th of May 2022, in the following terms, namely;

1. “That the parties shall remain co-guardians in respect of the minor child as provided for in sections 18(2)(c), (4), and (5) of the Children’s Act, No. 38 of 2005, as amended (“the Children’s Act”).
2. That the parties shall remain co-holders of Parental Responsibilities and Rights in respect of the minor child as referred to in Sections 18(2)(a) and 18(2)(b) of the Children's Act.
3. That the Respondent shall not be entitled to relocate outside a (20) kilometer radius from the seat of the High Court of South Africa, Western Cape Division, Cape Town, until the child is (3) years of age and only if the following conditions have been met, namely:

3.1 That a maintenance order has been mediated and formalized.

3.2 That no further attempts are made by the Respondent to undermine and/or obstruct the Applicant’s contact with the minor child.

3.3 That unless an agreement is reached regarding relocation, the minor child has been appropriately assessed by a suitably experienced and qualified professional/professionals, and any condition that has been described as a disability or indicates that the minor child needs special education, care, treatment, or medical needs has been excluded. In the event of a diagnosis to the contrary, access to appropriate treatment and/or education shall be considered prior to relocation being confirmed.

3.4 That the Respondent has secured permanent employment at her proposed relocation destination, or the Respondent is able to demonstrate her ability to provide for the minor child, including suitable accommodation, alternative care, educational and medical resources.

3.5 That the Applicant or an appropriately qualified and experienced professional, nominated by him has visited the proposed relocation destination, accommodation, and other facilities for the minor child and that he is able to meet members of the minor child's maternal family with whom the minor child will become acquainted. In the event of the Applicant attending to the above, he should be accompanied by an individual of the Respondent's choice to advise him regarding protocol.

3.6 That a Parenting Co-ordinator has been appointed to mediate disputes between the parties pertaining to the minor child.

4. That pending the relocation (if any) of the minor child and the Respondent, the child shall primarily reside with the Respondent and the Applicant shall have the following minimum contact with her:

4.1 Unsupervised contact on Mondays, Wednesdays, and Saturdays from 11h00 to 14h00 to be exercised at the Applicant's home or another venue of the Applicant's choice. In the event of the Applicant being unable to exercise contact on a Saturday, he shall be entitled to elect to exercise such contact on Sunday instead, if he has given (48) hours advance notice of his election.

4.2 That the Applicant shall collect the minor child from the Respondent's residence (15) minutes prior to the contact time and shall return the minor child to the Respondent's residence by no later than 14h15. It is specifically recorded that the travel time of (15) minutes shall be extended to allow for sufficient travel time in the event of the Respondent and the minor child moving to alternate accommodation that is not within a (10) km radius of the Applicant's residence, and in such case the Applicant shall collect the minor child for purposes of contact, whereas Respondent shall collect the minor child after contact from the Applicant's home, should the Applicant exercise contact away from his home, he shall be obligated to return the minor child after contact.

4.3 That the Respondent's nanny or the Applicant's nanny, shall be present during the handovers of the minor child between the parties when available (but shall accompany the minor child during contact periods only on the Applicant's request), failing which the minor child will be handed by the Respondent to the Applicant at the car park of the Respondent's accommodation.

4.4 That the Applicant shall not consume any alcohol, beyond the legal driving limit, prior to or during his contact time with the minor child.

4.5 That when the minor child is in the Applicant's care, the pool cover shall remain secured over the Applicant's swimming pool unless he swims with the minor child, whereafter the pool cover will again be secured.

4.6 That the childproofing previously required shall remain in place and be properly secured to always ensure the minor child's safety.

4.7 That the parties shall limit their communication to issues being about the minor child.

4.8 That the contact as set out in paragraph 4.1 shall be extended with one hour per visit every six (6) months, the first such increase to take place on 1 October 2022.

4.9 That the Applicant, in addition to the contact as set out hereinabove, shall exercise one night of sleepover contact per week with the minor child when she turns three (3). When the minor child turns four (4) the sleepover contact shall be increased to two consecutive nights per week and when the minor child turns six (6), the Applicant shall be entitled to exercise sleepover contact with the minor child for five (5) nights per fortnight.

4.10 That unless otherwise agreed to by the parties in writing, the Respondent and the minor child shall be permitted to travel out of the province for holiday purposes for a maximum of four consecutive weeks, twice annually, and shall also be permitted to travel on two further occasions per annum for a duration two consecutive weeks per time, after which they shall return to the Cape Metropolitan Area. The Respondent shall on each occasion provide the Applicant with the physical address and contact details (landline and mobile phone) of the place where they will stay when they are on holiday. The Applicant's aforesaid contact shall be suspended for the duration of the Respondent and the minor child's travel time unless the Applicant is able to exercise contact to the minor

child in the province where the minor child is at the relevant time. The Respondent and the minor child's travel dates should not include the minor child's birthday, Christmas, or the Applicant's birthday unless otherwise agreed to by the parties

in writing.

4.11 That the Applicant shall also be entitled to exercise contact with the minor child for at least two hours on her birthday, Father's Day, and Christmas Day.

5. That in the event of the minor child's relocation, either by order of the court or by mutual agreement between the parties, when the minor child turns (3) and subject to the conditions as set out in paragraphs 3.1 to 3.6 above having been met, the following contact shall apply:

- 5.1 The Applicant shall continue to exercise such contact as is applicable pursuant to paragraph 4 above and shall in addition thereto have one overnight contact with the minor child (from 16h00 on the first day, until 10h00 on the second day per week), regardless of the number of weeks that he stays.
- 5.2 The Applicant shall have the first option to care for the minor child as opposed to a third party if he is in the relocation destination which shall be exercised in addition to the usual contact times.
- 5.3 When the child turns (4), the Applicant's contact as set out hereinabove shall be increased to two consecutive overnight contact with the child per week.
- 5.4 When the child turns (5), the Applicant's contact as set out herein above shall be increased to three consecutive days and overnight contact per week.
- 5.5 When the minor child turns (6), the Applicant's contact as set out hereinabove shall be increased to one week at a time and each school holiday, at a venue of his choice.
- 5.6 When the minor child turns (8), the Applicant's contact as set out hereinabove shall be increased to two consecutive weeks at least twice per year, at a venue of his choice, including Germany. The Applicant shall also exercise contact with the minor child for at least 50% of all school holidays, regardless of where the Applicant finds himself at the relevant time.
6. That the parties shall make joint decisions about the following issues concerning the welfare of the minor child:
- 6.1 Her enrolment in a pre-school, or school, extra tuition, her enrolment in extramural activities, and her tertiary education.
- 6.2 Major decisions relating to her mental health care and medical care. This shall not include her day-to-day medical care or emergency treatment (should day-to-day or emergency medical treatment take place, the other party will be notified accordingly).
- 6.3 The selection of a General Practitioner, dentist, paediatrician and/or any other health care professional for the minor child.
- 6.4 Decisions affecting contact between the minor child and either of the parties.
- 6.5 Relocation to another province other than provided for in terms of this order.
7. That a Parenting Coordinator shall be appointed to mediate disputes between the parties pertaining to the minor child, in accordance with annexure "X" hereto.
8. That the Applicant shall contribute to the minor child's maintenance until she attains the age of majority or completes her secondary schooling, whichever occurs last, by:

8.1 making payment to the Respondent in respect of the minor child's maintenance in the amount of R 7 000.00 per month into a local bank account to be nominated by her from time to time, by way of electronic fund transfer. The first such payment shall be made on the first day of the month following the granting of an order herein and thereafter on the first day of each and every succeeding month, for as long as the minor child primarily resides with the Respondent, without any deduction or set-off.

8.2 making payment of the minor child's medical aid premium in respect of the fund that she is currently registered on, or a plan analogous thereto, directly to the institution involved. The Applicant shall be responsible for payment of all the minor child's reasonable medical expenses incurred in excess of the cover provided by the medical aid scheme, such costs to include all reasonable medical, dental, pharmaceutical (limited to prescription medication, including levies), surgical, hospital, orthodontic and ophthalmic (including the provision of spectacles and/or contact lenses), physiotherapeutic, psychotherapeutic, and occupational therapeutic expenses. In the event of the Respondent having to incur medical expenses on behalf of the minor child for more than R1000, 00 per month, she shall first obtain the Applicant's written consent, which consent shall not unreasonably be withheld.

8.3 making payment of the minor child's school fees (limited to public schools), creche, playschool, and aftercare (only in the event of the Respondent being employed), which payments shall be made directly to the institution involved. The Applicant shall further make payment of the reasonable cost of the minor child's additional tuition costs, books and stationery, the cost of provision and maintenance of computers/laptops (as prescribed by the school), the cost of school outings, camps, and school tours, as well as the cost of school uniforms, extra-mural and sporting activities and equipment reasonably required therefor. In

the event of the Respondent having to incur educational expenses on behalf of the minor child in excess of R1000,00 per month, she shall first obtain the Applicant's written consent, which consent shall not unreasonably be withheld.

8.4 increasing the maintenance as set out in paragraph 8.1 above, annually on the first day of the month succeeding the anniversary date of the granting of an order herein, by the average percentage change in the Headline inflation rate (also known as the Headline Consumer Price Index), as notified from time to time by Statistics SA, (or its equivalent), in respect of the Republic of South Africa for the preceding twelve months. Such percentage change shall, for purposes of convenience, be deemed equal to the latest index available from Statistics SA.

9. That the Applicant shall (ex gratia and without having any such legal obligation) contribute towards the Respondent's living expenses, whilst she and the minor child are permanently resident in the Cape Metropolitan Area, but limited to a period of (15) months or until the child reaches the age of (3) years, whichever occurs last, by:

9.1 By making payment in the amount of R7400,00 per month to the Respondent. The aforesaid amount shall be paid on the first day of the month succeeding the granting of an order herein and thereafter monthly in advance on the 1st day of each succeeding month, by way of electronic fund transfer, into a local bank account to be nominated by the Respondent, without any deduction or set-off.

9.2 By making payment of the Respondent's medical aid premium, directly to the institution involved, in respect of the medical aid fund on which she is registered as at the time of the granting of an order herein, or a fund analogous thereto.

9.3 By making payment of a monthly rental in respect of a property for the minor child and the Respondent to reside in, to a maximum amount of R13 000,00 per month (together with annual increases). The Applicant shall be liable for payment of the deposit as required by the Lessor, which amount shall be refunded to the Applicant upon cancellation of the lease agreement. In the event of the Respondent not being able to enter into a lease agreement, the Applicant shall enter into the lease agreement in her stead, alternatively stand surety for the lease agreement, whichever is demanded from the Lessor.

9.4 Neither party shall be entitled to extend or curtail the period provided for in paragraph 9 above, other than by mutual agreement in writing, and neither party shall be entitled to seek an increase or decrease in the monthly amount payable.

9.5 The ex-gratia payment made herein shall not confer any maintenance obligation on the Applicant towards the Respondent personally.

10. The Applicant is hereby authorized to take all such steps, without limitation, as may be required to have the minor child's birth certificate rectified to include the Applicant as the biological father of the minor child, specifically being authorized to take all such steps and sign all such documents as may be required without the Respondent's consent or co-operation and without her presence being required at the Department of Home Affairs.
11. That the Respondent is directed to comply with doctors, specialists, and other medical personnel's existing and future recommendations in respect of the minor child's medical care.
12. That the relief sought relating to the contempt application is postponed sine die.
13. The Respondent is directed to pay 50% of the costs of and incidental this application on a party and party scale (as taxed or agreed,) including the costs of counsel'
- [4] In addition, I annexed to my order a list of agreed directives and the 'terms of reference' for a parenting coordinator that was also appointed by the parties by agreement. These directives and the terms of reference for the a parenting co-ordinator were the following;

1.1 In order to resolve disputes, arising from the parties exercising their Parental Responsibilities and Rights as provided for herein, the parties agree that a parent coordinator("PC") be appointed.

1.2 The parties hereby appoint psychologist Astrid Martalas to be the first PC in respect of disputes arising between them, with regard to any aspect requiring a joint decision in respect of the minor child and any other matter arising from failure to comply with the provisions of this agreement.

1.3 The PC shall continue to act until he/she resigns, or both parties agree in writing that his/her appointment shall be terminated, or his/her appointment is terminated by an order of the High Court having jurisdiction. If the PC's appointment is terminated, he/she shall be substituted by another PC, who shall be a qualified mediator, with at least ten years of experience, conversant with working with children and families in the above context, and who shall be appointed by agreement, failing which, by the chairperson for the time being of FAMAC, Western Cape, in consultation with the parties.

1.4 If the parties are unable to reach an agreement on any issue requiring a joint decision (excluding issues surrounding guardianship, primary care, overseas travel, relocation from South Africa or any province), the dispute shall be formulated in writing and referred to the PC who shall attempt to resolve the dispute by way of mediation, as speedily as possible.

1.5 If the PC, in the exercise of his/her sole discretion, regards a particular issue raised by one of the parties as trivial or unfounded, he/she is authorized to decline the referral of such issue.

1.6 If the PC is unable to resolve a dispute, by way of mediation, he/she may resolve the dispute by issuing a directive, which shall be binding on the parties, if he/she shall only be entitled to issue directives relating to issues requiring a joint decision or directives required for purposes of ensuring the parties' compliance with the provisions of this agreement.

1.7 Each party and the minor child (if necessary) shall participate in the dispute resolution process, as requested by the PC.

1.8 The PC shall use his/her discretion in considering the weight and sufficiency of information provided and may expand his/her enquiry as he/she may deem necessary. Each party agrees to give the PC the power to gather information through interviews, correspondence, email, telephonic and/or other informal means, and to make his/her recommendations on the information provided and obtained.

1.9 The parents shall not be entitled to insist that any meeting or session is tape-recorded, videoed, or recorded in any manner whatsoever.

1.10 No record needs to be kept by the PC, except any recommendations, directives, or agreements reached by the parties.

1.11 Each parent shall provide the PC with all information reasonably requested by him/her pertaining to the minor child.

1.12 Communications between the parents and the PC shall be deemed privileged and not be used in Court proceedings, except for:

1.12.1 any agreements of the parents successfully mediated and summarised by the PC;

1.12.2 the findings and recommendations of experts appointed by the PC;

1.12.3 directives issued by the PC.

1.13 The PC shall determine the protocol of all communications, interviews, and sessions, including who shall or may attend meetings. Legal representatives are not entitled to attend such meetings, but a party shall be permitted to caucus with his or her legal representatives, either in person or by telephone, during such meetings. The party and their attorneys shall have the right to

initiate or receive oral communication with the PC. Any party or counselor may communicate, in writing, with the PC, provided that copies are provided to the other party, and if applicable, their legal representatives;

1.14 The PC may confer individually with the parties and with others, including step-family members, extended family members and friends, permanent life partners, household members, school and educational personnel, care providers, healthcare providers for the child and therapists for the child and the parties, and the parties authorise such persons to provide information relating to the minor child and the specific dispute, at the time, to the PC;

1.15 The PC is authorized to appoint such other person, as may be necessary, in order for the PC to make a decision in respect of the issue in dispute, including the appointment of experts, if he/she deems it appropriate or necessary, relating to the minor child and the specific dispute at the time, provided that in the event of any cost implication to the parties, their consent shall first be obtained.

1.16 The PC is authorized to:

1.16.1 Mediate and facilitate joint decisions in respect of the minor child, having regard for the best interests of the minor child.

1.16.2 Mediate the contact arrangements in respect of the minor child, having regard to her best interests, without altering the basis of contact.

1.16.3 Issue directives binding on the parties, subject to the limitations as set out above, and subject to judicial oversight in the form of an appeal.

1.16.4 Resolve conflicts (by way of mediation) relating to the implementation/adaptation of this agreement or any subsequent Parental Responsibilities and Rights agreement, having regard to the best interests of the minor child.

1.16.5 Require the parties and/or the minor child to participate in psychological or other evaluations or assessments, provided that, in the event of costs having to be incurred, the parties' consent shall first be obtained.

1.17 The PC is not appointed as a psychotherapist, counselor, or legal representative for the child or either of the parties.

1.18 The parents record that they are aware of their right to consult appropriate professionals in these fields, as and when necessary.

1.19 All participants, including the PC, the parties, and legal representatives, shall use their best efforts to preserve the privacy of the family and, more particularly, the child and restrict the dissemination of information related to decisions, to those who need to know the information.

1.20 In the event that a party fails to participate in any mediation/facilitation, despite having been requested to do so by the PC, fails to attend a facilitation session, or fails to reply to the PC's communications within 10 (TEN) days upon notice being given to attend, which communications may be by telephone, email or fax, or fails to pay the PC's costs upon request, or fails to co-operate with the facilitation process in any other way, the PC shall proceed with the mediation/facilitation in the absence of that party. The PC shall be entitled to issue a directive (subject to the limitations as set out above) and his/her decision shall be binding on both parties as if they had both participated in such facilitation until such decision has been varied

by a court of competent jurisdiction.

1.21 The parties shall be responsible for the costs of the PC on an 80/20 basis (80% being the Applicant and 20% being the Respondent) unless otherwise determined by the PC. The PC shall be empowered to direct that a party shall refund the costs of facilitation, or part thereof, to the other party in appropriate cases.

1.22 The PC may decline to convene meetings or to issue directives until such time as his/her costs and the costs of any other person appointed in terms of the paragraphs above, have been paid.

The History of the Litigation

- [5] This very unfortunate matter had its genesis in an urgent application instituted by the applicant last year in terms whereof he sought an order; (a) confirming that he is the holder of parental responsibilities and rights in respect of the parties' minor child;
- (b) confirming his rights in respect of the guardianship of the minor child;
- (c) that a clinical psychologist be appointed by the applicant to conduct an investigation into the parties' respective parental responsibilities and rights; (d) that a clinical psychologist be appointed by the applicant to conduct an investigation regarding care and contact arrangements and, (e) that a clinical psychologist be appointed by the applicant to file a report containing recommendations relating to the parties' co-operation and also directing that a clinical psychologist also be entitled to make interim recommendations;

- [6] In addition, relief was also sought that the respondent is restrained from relocating pending a court of competent jurisdiction determining otherwise in the absence of an agreement between the parties and an order directing the respondent to take all such steps as may be required to have the minor child's birth certificate rectified in order to include the applicant as her biological father.
- [7] The application that was launched by the applicant was done so, as a matter of urgency;
- (a) because the applicant has been at the respondent's mercy in respect of all his contact with the minor child which contact was at times withheld and which he believed generally to be unreasonably restrictive and, (b) because the applicant deemed it to be appropriate to obtain expert guidance regarding what care and contact arrangements would be in the best interests of the minor child.
- [8] It was alleged that the respondent constantly threatened to relocate without suitable living and other arrangements in place. Despite numerous requests, the respondent refused to provide an undertaking not to relocate pending the appropriate assessments having been concluded.
- [9] When the matter was first presented to the court the parties reached an interim agreement in terms whereof the parties agreed on the following; (a) that the applicant was confirmed as a co-holder of full parental responsibilities and rights in respect of the minor child; (b) that the office of the family advocate would conduct an assessment in respect of the parties' parental responsibilities and rights including care and contact arrangements and, (c) that the office of the family advocate would file a report within three months containing the interim and final recommendations in this connection.
- [10] Pending the interim or final recommendations by the office of the family advocate it was agreed; (a) that the applicant would have contact with the minor child four times per week via an electronic medium; (b) that the office of the family advocate would be entitled to make further interim contact recommendations should this be deemed appropriate from time to time; (c) that the respondent would not relocate provided that the applicant continued to bear the respondent's costs and the minor child's costs of accommodation.
- [11] In addition, it was agreed that the respondent shall take all such steps as may be required to have the minor child's birth certificate rectified in order to include the applicant as the biological father of the minor child.
- [12] An interim report was filed by the office of the family advocate more than six months ago in terms whereof it was recommended that pending a further investigation; (a) that the applicant would have contact with the minor child twice per week via an electronic medium and, (b) that the applicant would have contact with the minor child once per week for two hours in the presence of the respondent's nanny. The applicant was to ensure that his home was baby-friendly and that the car seat was used when transporting the minor child.

[13] The applicant was obliged once again to apply to the court to set the application down for a further hearing as the respondent refused to accept the recommendations by the office of the family advocate and allow them to be implemented.

[14] The parties thereafter presented before the Judge President who by agreement between the parties granted an order in the following terms pending finalization of the litigation herein, namely; (a) that the respondent would not be entitled to relocate provided that the respondent's and the minor child's accommodation costs

are paid for; (b) that the applicant would enjoy contact twice per week via an electronic medium; (c) that the applicant would enjoy physical contact to the minor child at the respondent's residence once per week in the presence of the nanny or a qualified

social worker or alternate suitable childminder to be appointed by the applicant at his costs and, (c) at the applicant's

residence once per week on the same conditions as specified above.

[15] The parties also undertook that neither of them would commit any act of domestic violence against the other or threaten the other with domestic violence and that both parties would be entitled to appoint an expert of their choice to conduct a care and contact assessment at their own respective cost. Finally, it was agreed that the applicant's home would be adequately child-proofed.

[16] Subsequently, the office of the family advocate filed another interim report and recommended that the then-existing contact arrangements were to remain in place and that the applicant would have further

contact with the minor child at his residence once a week for two hours in the presence of the nanny in the respondent's

employment, failing which a qualified social worker or alternate suitable childminder to be appointed by the applicant and this, at his cost.

[17] As a direct result of this order, the applicant was again obliged to present his case to court because the respondent refused to allow any physical contact to take place with the minor child unless it was supervised by her personally. Further, the respondent refused to continue to co-operate with the assessment conducted by the applicant's expert of choice. The applicant's expert in the interim had recommended that contact should henceforth be unsupervised and at venues of the applicant's choice, provided these venues were child-friendly, safe, and appropriate. The respondent did not accept these interim recommendations.

- [18] The applicant thereafter again sought extended relief relating to the issue of interim contact and requested that the recommendations made by the applicant's expert be implemented together with a contempt application relating to the respondent's contempt in failing to give effect to the provisions of the previous extant court order. This relief was opposed and further affidavits were filed.
- [19] A number of further interlocutory orders followed which did not in any manner significantly amend the extant order save for the fact that the respondent was to provide the applicant with full particulars of her intended relocation in order to place the applicant in a position to consider whether such relocation would serve in the best interests of the minor child and the mandate of the office of the family advocate to continue with their investigation, was extended.

The Position Adopted by the Respondent

- [20] It was common cause that the respondent took it upon herself to supervise the ongoing contact of the minor child, as she put it, in order to ensure the safety of the minor child. The respondent complained that all the experts were biased against her. This is hard to discern as she was given the full and unfettered opportunity to appoint an expert of her own choosing. Significantly, she elected not to participate in the ongoing evaluation by the applicant's expert. As far as her intention to relocate was concerned she initially stated that she wanted to relocate to Polokwane and thereafter she averred that she intended to return home to some of her family.[1]

The Position Adopted by the Applicant

- [21] The applicant voiced his concerns about the possibility of the minor child's sense of security and stability being disrupted by the respondent's impulsive decision to relocate to Johannesburg to live with her new partner and thereafter subsequently indicating that she wanted to relocate to her hometown and also wanting to relocate to Polokwane.
- [22] The applicant was also concerned about the respondent's indication that she desired to return to her hometown because; (a) she never spoke positively about her family or indicated any desire to live with or near them;
- (b) while she had a relationship with one or two of her cousins, she and her father did not have a positive relationship and, (c) her lifestyle priorities and standard of living were not consistent with that of her family or community of origin and this raised concern about the respondent's given reasons for wanting to relocate.
- [23] The applicant's case was that the respondent adopted a restrictive parental gatekeeping methodology and pointed out that the respondent was sometimes defiant to and with recommendations from the office of the family advocate, other professional interventions, and with court orders. The applicant's main concern was focused on the apparent developmental delays in connection with the minor child, specifically in respect of language and speech, and that she mostly refused to eat or drink anything whilst in his care. Finally,

concerns were raised that a relocation may have resulted in an attachment disruption at this stage of the development of the minor child.

Consideration

- [24] It seemed clear from the various averments in the papers that the core complaint by the respondent was that she did not want to remain in Cape Town. No relocation plans were set out, nor were any details provided regarding what accommodation would be secured and what care arrangements would be in place for the minor child in the event of a relocation order. Further, it was not indicated how the respondent and the minor child would be maintained. Further, care and contact details and arrangements were glaringly absent from the papers on behalf of the respondent.
- [25] The respondent clearly indicated that the relentless conflict and litigation between her and the applicant was one of the main reasons for her wanting to relocate. However, the respondent also indicated that she was willing to consider remaining in Cape Town and committing to raising the minor child here until the minor child reached the age of majority. She however stipulated three non-negotiable conditions for her to remain in Cape Town, namely; (a) that all conflict, harassment, and legal proceedings would have to come to an end; (b) that she would be able to travel freely to her hometown with the minor child for the purposes of family visits and participation in cultural and religious ceremonies, rituals and traditions and, (c) she would be provided with an appropriately secure and permanent home in Cape Town for her and the minor child purchased by the applicant and registered in her or the name of the minor child.
- [26] The applicant's expert in the main opined that the applicant and the minor child had formed an attachment and that the applicant was a predictable, responsible, and responsive father to her. The minor child presented some developmental anomalies, which included significantly delayed speech, sensory sensitivity, avoidant and restrictive eating patterns, atypical social interaction and communication, and intolerance to change.
- [27] Most significantly she formed the view that it would better serve the minor child's interests for her to remain near both of her parents until at least the age of three years, by which time she would be better positioned developmentally to be able to maintain her attachment to the applicant despite less regular and less frequent contact with him. Finally, she concluded that relocation in the absence of; (a) a comprehensive parenting plan; (b) a maintenance order and, (c) the securing of permanent employment for the respondent rendered the relocation with the minor child at this stage, premature.
- [28] A number of reports were filed by the office of the family advocate. Most importantly it was emphasized that there was no doubt that should the minor child relocate with the respondent, her developing attachment to the applicant would be damaged. Further, that the positive parenting and communication progress between the parties required more time for it to be stable and strong enough to ensure that the minor child would not experience

any further alienation from the applicant once the respondent relocated. The reports by the office of the family advocate for the most part supported the report by the applicant's expert.

- [29] Regrettably, the respondent persistently refused to accept the recommendations of the various experts involved and an unfortunate pattern emerged by the respondent of reporting the experts involved when their recommendations did not benefit her. The respondent went on to allege bias, discrimination, or a financial imbalance.
- [30] Most (if not all) of the arguments advanced by the respondent were technical arguments that did not deal with the real and core issues of relocation. I was not persuaded that the respondent's proposed relocation was bona fide, reasonable, and in the minor child's best interests.
- [31] The applicant also requested the court to appoint a parenting coordinator and this portion of the relief was not opposed by the respondent. I held that the appropriate relief would be not to grant the respondent the right to relocate at this stage and also to appoint a parenting coordinator to assist the parties in agreeing to an appropriate mechanism for the regulation of the applicant's contact with the minor child following upon the respondent's eventual relocation.
- [32] I need to stress both the importance of due recognition of the realities of any relocation and also the dangers of obstructing the reasonable proposals of the primary caregiver. Because the respondent (as the primary caregiver) had not secured any employment that required her to live in another jurisdiction was one of the decisive factors in the determination of this delayed relocation application. In the circumstances of this case, it seemed abundantly clear to me that any relocation at this stage would not and could not be in the best interests of the minor child. However painful this may be for the respondent, the respondent has got to grasp and appreciate that fact.
- [33] I fully appreciated that the respondent would be less than human if she did not feel a sense of frustration in view of the relocation order that was granted and this may well spill over into a sense of resentment against the applicant. If this has indeed happened, she ought to reflect upon the happiness and the stability of her minor child. This is one of the core factors that had to be given great weight when weighing up the various factors that arose when this court had to decide whether or not to give leave to take the minor child out of the jurisdiction.
- [34] Put in another way, in the event that I granted the relocation order at this stage, undoubtedly I would have jeopardized and put a blight on the potential for the serenity and happiness of the minor child. This would have been manifestly contrary to the welfare of the minor child. That is a reality that a court determining an application for relocation simply has to recognize.

- [35] There also remained with me a serious query. It was undoubtedly the case that the respondent in character was mercurial. I took a slightly gloomier view about this than her counsel. I say this because the respondent's irresponsibility and disregard for the provisions of court orders left a lot to be desired. The less said about this, the better. By contrast, I found that the applicant was a sensible and responsible parent. My primary focus was to determine what was in the best interests of the minor child. Besides, the court-appointed experts reported and recommended the terms of the court order that was eventually granted
- [36] In view of all these factors, I formed the wholesale view that the respondent's decision to relocate was not bona fide, reasonable and genuine. Simpliciter, the respondent could not afford to relocate. In assessing the issue of the bona fides of the respondent, I took into consideration; (a) that the respondent had not planned her relocation pursuant to due diligence ensuring the minor child's best interests; (b) that the respondent's true motivations for wanting to relocate were in question; (c) that the respondent's past conduct predicts that she would not ensure that the applicant's bond with the minor child would be retained and built on should relocation be allowed at this stage and,
- (d) due to the minor child's young age, a further period for the relationship between the minor child and the applicant fell to be strengthened as recommended by the experts involved in order to serve the best interests of the minor child.
- [37] I accepted that the relationship between the applicant and the minor child would be prejudiced if the relocation order was granted. The disadvantages of the relocation far outweighed the advantages of the relocation. I also failed to understand the respondent's real motivation for relocation. I say this because my order is in the form of an interim measure (subject to conditions) only until the minor child reaches the age of three years old. By agreement, a parenting coordinator was appointed to assist the parties in agreeing to an appropriate mechanism for the regulation of their disputes about their minor child. This, even in the event of an eventual relocation.

Costs

- [38] One of the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.[2]
- [39] The last thing that our already congested court rolls require is further congestion by an unwarranted proliferation of litigation.[3] It is so that when awarding costs, a court has a discretion, which it must exercise judiciously and, after due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.[4]

- [40] No hard and fast rules have been set for compliance and conformity by the courts unless there are special circumstances.[5] Costs follow the event in that the successful party should be awarded costs.[6] This rule should be departed from only where good grounds for doing so exist.[7] In all the circumstances of the matter, I held the view that it was warranted that a portion of costs in this matter fell to be paid by the respondent because the respondent simply defied or ignored a number of the court orders issued out in this matter.
- [41] These are then my considered reasons for the refusal of the relocation application as set out in my order. These are reasons in terms of the Uniform Rules of Court (as they find application in the High Court) and, not in terms of the wholly defective and inadequate ‘application’ for reasons filed by the respondent.

E. D. WILLE

Judge of the High Court

Cape Town

- [1] In ‘Gqeberha’ (This was her ‘hometown’).
- [2] Union Government v Gass 1959 4 SA 401 (A) 413.
- [3] Socratous v Grindstone Investments (149/10)
- [2011] ZASCA 8 (10 March 2011) at [16].
- [4] Intercontinental Exports (Pty) Ltd v Fowles 1999
- (2) SA 1045 (SCA) at 1055F- G
- [5] Fripp v Gibbon & Co 1913 AD 354 at 364.
- [6] Union Government v Gass 1959 4 SA 401 (A) 413.
- [7] Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd 1996 3 SA 692 (C)

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