

SOUTH AFRICA / JUDGMENT

T.R.S v U.A.R and Others (2023-019086) [2023] ZAGPJHC 1225 (27 October 2023)

[2023] ZAGPJHC 1225

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

2023-019086

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
JOHANNESBURG)

Case

No. 2023-019086

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

REVISED

27.10.23

In the matter between:

TRS

Applicant

And

UAR

First

Respondent

NATIONAL

COMMISSIONER, SOUTH AFRICAN POLICE

Second

Respondent

MINISTER

OF HOME AFFAIRS

Third

Respondent

DIRECTOR

GENERAL: DEPARTMENT
 OF HOME AFFAIRS
 Fourth
 Respondent

JUDGMENT

WILSON J:

1 The applicant, TRS, has applied for an order authorising her permanent relocation with her two children to Israel. The first respondent, UAR, is the father of both children. The parties have a joint custody arrangement, each spending an equal amount of time living with and caring for the children. UAR opposes the application. In an ideal world, it appears that he would prefer both the children

and TRS to remain in South Africa. However, if TRS does relocate to Israel, then UAR believes that their children should remain with him.

2 There appear to be two fundamental drivers behind TRS's application. The first is that she is currently illegally in the country. Her spousal visa, which she acquired as a result of a previous marriage, has long since expired. She later unwisely obtained a fraudulent permit on which she relied for some time to remain in the country. She was eventually found out, charged, convicted, and is now subject to deportation as an illegal foreigner. There is no suggestion that the third respondent, the Minister, is inclined to revisit TRS's status as an illegal foreigner, and I must accept, for present purposes, that she is liable to deportation

at any time. It appears that the Minister has agreed to stay his hand until Monday 30 October 2023, but there is no guarantee that TRS will be allowed to remain in South Africa beyond that date.

3 The second driver behind the application is that TRS sees Israel as a safe and prosperous place in which to bring up the children. She has Israeli and United States passports. She adverts to what she says is a loving and supportive extended family in Israel,

and is intent on returning to Israel after what has been, by all accounts, an emotionally volatile time in South Africa.

4 The question of whether TRS should be permitted to relocate to Israel with the children seems to me to be one of real complexity. As things stand, both she and UAR play equally important roles in their children's lives. I have no doubt that each of them has developed a close and loving bond with the children. Whatever happens in this case, the children are likely to suffer some detriment. If TRS leaves with the children, they will lose the closeness of a loving father. If TRS leaves without the children, they will be separated from their mother. At the tender ages of 1 and 3, either of these outcomes could be devastating for them. But just as potentially undesirable is a situation in which TRS remains precariously in South Africa to be with the children, with all the

stress that would cause her, and which would likely be transmitted in some way to the children. Another possible outcome is that TRS is given leave by the Minister to remain in South Africa permanently, but that she never really settles here, and is left in a state of anguish and resentment as a result. That, too, will clearly affect the children and their well-being.

5 The papers in this matter are substantial, and contain, in addition to the bare facts of the situation, a great deal of unhelpful crossfire. There are, however, two independent reports that address the children's best interests with a degree of impartiality. One, produced by a Dr. F, deals with the residence, care and contact regime that should apply to the parties and their children. Dr. F is very clearly of the view that residence, contact and care should be shared equally between TRS and UAR. It seems clear

that this is at least in part why the parties have adopted that arrangement. The second report, produced by a Mr. C on 13 October

2023, less than two weeks before this matter was called for argument before me, takes the view that the children should not be allowed to relocate with TRS to Israel. It criticises TRS as vague and unrealistic in her expectations of what can be done to provide the necessary care and support to the children in Israel. It strongly recommends that the children stay in South Africa, close to UAR, but does not appear to come to grips with the fact that long-term residence in South Africa may not be possible for TRS because of her immigration status.

The postponement application

6 When the matter was called before me on 26 October 2023, Ms. Feinstein, who appeared for TRS, applied to postpone the relocation application, in order to give TRS an opportunity to deal with Mr. C's report. Ms. Feinstein also adverted to the present military and political instability in Israel, but, given the conclusion to which I have come, I need not consider whether that instability merits a postponement.

7 It seems to me that TRS is entitled to a postponement to deal fairly and at length with Mr. C's report. The report is plainly very prejudicial to TRS's case. If its conclusions are accepted, it would likely put an end to that case. Ms. Feinstein criticised the report on two principal bases. First, it was said that Mr. C had simply assumed that TRS's permanent residence in South Africa was a viable outcome. That, Ms. Feinstein submitted, cannot be assumed, precisely because TRS is presently in ongoing danger of deportation. What Mr. C failed to come to grips with was the possibility there may be no way that both TRS and UAR can remain in the same jurisdiction. Mr. C's failure to address that very likely eventuality, Ms. Feinstein submitted, tainted the report. At the very least, Ms. Feinstein submitted, Mr. C's conclusions were drawn under a misconception.

8 A second significant line of attack was that Mr. C had drawn conclusions about the kind of extended family support network TRS could reasonably expect in Israel without interviewing any of the people that would be involved in providing TRS with the support she needs. This, too, Ms. Feinstein submitted, tainted the report, and rendered it unreliable.

9 There were other criticisms of the report, but I do not think I need to address them. The fact is that, on the face of Mr. C's report, Ms. Feinstein's criticisms have some substance. That is not the same as saying that the report ought to be disregarded, or that its conclusions will turn out to be unsound. I need not be convinced of that. All that matters is that there may be aspects of the report that require further evaluation or elaboration. Mr. C himself accepts in his report that the report was produced under "circumstances of urgency" and that "there was not enough time to explore every issue pertaining to the parties and their histories". That notwithstanding, Mr. C is clearly as sure as he can be of his conclusions. But the pressure under which the report was compiled does beg the question of whether I should accept those conclusions, and whether TRS ought not to be given a fair opportunity to deal with them.

10 Ms. Bezuidenhout, who appeared together with Ms. Strathern for UAR, could not really gainsay the fact that Mr. C's report is highly prejudicial to TRS's case. Nor could she advance any meaningful argument against the two critiques advanced by Ms. Feinstein, to which I have already adverted. Her opposition to the postponement application was based principally on the contention that the relocation application bears no prospects of success and that a postponement would merely delay its inevitable dismissal. Ms. Bezuidenhout called in aid of that proposition the decision of the Constitutional Court in *Lekolwane v Minister of Justice* [2006] ZACC 19; 2007 (3) BCLR 280 (CC), where, at paragraph 17, the court made clear that the prospects of success on the merits of the main application are material to any decision on whether to postpone a hearing on those merits. As a general proposition, this is no doubt true. But in choosing to advance her case on that basis, Ms. Bezuidenhout set herself a very high bar. It seems to me that the prospects of success on the merits would only be determinative of a postponement if the main application were so manifestly ill-conceived that it was doomed to failure.

11 As must be abundantly clear by now, this is not that kind of case. Indeed, before Mr. C's report was delivered, UAR himself contended that TRS's case was such that there were material disputes of fact on the papers that could only be determined by oral evidence. UAR instituted and then indicated that he wished to withdraw an application for a referral to trial for that reason. In addition, I was informed during the hearing of this matter that Mr. C was present in court and willing to be cross-examined on his report. None of this is consistent with the proposition that TRS's case is so bad that it can be dismissed out of hand.

12 The true situation is, I think, that TRS's application is only likely to fail if Mr. C's conclusions are accepted. But, in light of TRS's preliminary criticisms of his report, I cannot say whether Mr. C's report would be accepted in the main case. And the report's merits cannot fairly be assessed unless TRS is given an opportunity to deal with it.

13 Prospects of success aside, I think the question in this case boils down to the balance of prejudice (see *Psychological Society of South Africa v Qwelane* 2017 (8) BCLR 1039 (CC) paragraph 37). The prejudice to TRS if I refuse a postponement is plain enough. She will not have an opportunity to deal with a report that, if the court adopts it, would be highly damaging to her case. Against this Ms. Bezuidenhout, despite being given a full opportunity to do so, could advert to no competing prejudice to UAR if a postponement were granted. It is of course true that the

prolongation of this case is inherently undesirable, but even less desirable is a decision that is highly likely to separate two boys of tender age from one of their parents without the relevant expert facts being properly matured and interrogated. To put it crudely, this is a case the parties, and the court, have to get right. To rush to the merits in the circumstances I have outlined risks serious error, with unfathomable, long-term detrimental consequences for two young boys only dimly aware, if they are aware at all, of the maelstrom of litigation surrounding them.

14 Ms. Bezuidenhout was trenchantly, and I think appropriately, critical of TRS's conduct of this litigation. There are choices that TRS has made in the pursuit of her case that plainly should not have been made. Her principal error was to seek a hearing of this matter before anyone else accepted that it was ripe for hearing. The publication of Mr. C's report has led to the ironic turn that TRS no longer believes that the matter is ripe for hearing. And UAR, seeing the wholesale adoption of Mr. C's

report as his path to victory, has now abandoned his earlier view, expressed in correspondence from his attorney sent to my registrar

shortly after the matter was allocated to me, that the case could not be properly heard so soon after that report was due to become

available. It turns out that UAR was right then, even if he now disavows his wisdom.

15 It seems to me that neither party has been consistent in their attitude to whether the matter is ripe for hearing. But neither party's prevarication makes any difference to whether the matter should be postponed. Ms. Bezuidenhout's justified criticisms of TRS's approach do not translate into a good argument for the main application to be heard prematurely.

16 For all these reasons, I think the prejudice to TRS that would result from my refusing a postponement outweighs, by some margin, any prejudice to UAR, or, more importantly, to the children's best interests, that would result from my granting the postponement. The postponement application must succeed.

17 The parties were agreed that, whatever the outcome of the application, a postponement *sine die* would be inappropriate without directions for the further conduct of the matter. I asked Ms. Feinstein to tender the terms of a postponement with which TRS would be content. I also asked her to engage with Ms. Bezuidenhout, and with Mr. Moodliyar, who appears for the third and fourth respondents, to the extent necessary to ensure that any deadlines set out in an order outlining the terms of a postponement are realistic. I made clear that engagement with the terms of the draft order obviously did not imply consent to it. I derived considerable assistance from the draft when it was submitted. I was able to have regard to, and I am grateful for, the first respondent's comments on it.

Interim relief in restraint of TRS' deportation

18 As things stand, TRS must report to the Department of Home Affairs on Monday 30 October 2023. Mr. Moodliyar was unable to give any undertaking on the Minister's behalf that TRS would not be deported there and then, or at any time thereafter if, in the exercise of the relevant officials' discretion, her deportation was considered appropriate. This is obviously a highly unsatisfactory situation. If TRS is deported before this application is finally determined, this court's jurisdiction will be compromised, and, perhaps more importantly, the parties' children will experience a sudden rupture in their relationship with TRS. Nothing could be more disruptive of the children's best interests, or of this court's ability to determine where those interests lie, than an outcome of that nature.

19 Despite quite properly acknowledging that section 165 (4) of the Constitution, 1996 requires his clients to "assist and protect the courts" and ensure their "independence, impartiality, dignity, accessibility and effectiveness", Mr. Moodliyar resisted an order restraining TRS' deportation on the basis that the separation of powers forbade it. I do not agree. The separation of powers is not a trump card that can be produced whenever counsel for an organ of state wishes to immunise their client from judicial oversight. It is a carefully balanced set of norms pregnant in the constitutional text that ensure that the executive, legislature and the judiciary assist and protect each other in the exercise of their proper functions. The capacity to determine a case that has been properly committed to it lies at the very heart of a court's function. Mr. Moodliyar identified no basis on which the Minister could justify TRS's deportation before this case is finally determined, but he was nevertheless unable to assure me that the Minister would stay his hand.

20 In the circumstances, I am left with no option but to restrain TRS's deportation pending the final determination of her relocation application on its merits. As that interdict is interim in nature, it remains open to the Minister or to the fourth respondent, the Director-General, to apply to court for appropriate relief in the event that new circumstances arise which justify the interdict's variation or discharge.

The 23 August 2022 interdict

21 On 23 August 2022, Francis-Subbiah J, then sitting as an Acting Judge, interdicted and restrained TRS from leaving South Africa. That order was part of a broader set of arrangements dealing with the residence, care and contact regime to apply to the children. It is not clear to me on what basis that interdict was imposed, and none of the parties sought to justify it before me. TRS asks that it be discharged. I see no reason not to do so.

Costs

22 There remains the question of costs. Each party sought a costs order against the other. I do not think that any costs order is appropriate at this stage. It seems clear that neither party has genuinely persisted in the view that this matter is presently ripe for hearing. TRS pushed the matter to a hearing despite ultimately acknowledging that a final determination of the merits could not appropriately be reached. UAR was firmly of the view that the matter could not proceed on the merits until Mr. C's report held out the prospect of a quick victory. For the reasons I have already given, that outcome was never realistic, and could not fairly be pursued. The costs of this

postponement application will be the costs in the main application.

Order

23 For all these reasons, I make the following order –

23.1 The application is postponed sine die.

23.2 The interdict imposed under paragraph 1.12 of Justice Francis-Subbiah's order dated 23 August 2022 under case number 004561/2022 is discharged.

23.3 The third and fourth respondents are interdicted and restrained from deporting the applicant pending the final determination of these proceedings.

23.4 The first respondent is granted leave to withdraw his application for consolidation and referral to trial of the proceedings under case numbers 004561-2022 and 019086- 2023 dated 14 September 2023.

23.5 The applicant is granted leave to file her affidavit dated 11 September 2023, and the affidavit is received onto the record.

23.6 The first respondent is granted leave to file his affidavit dated 17 October 2023, and the affidavit is received onto the record.

23.7 The applicant is directed to approach the office of the Deputy Judge President to request a hearing of the relocation application during the second half of the second term of 2024. The approach must be made by no later than 1 December 2023.

23.8 The applicant may, if she chooses to do so, deliver a supplementary affidavit containing those expert facts strictly necessary to deal with Mr. C's report, dated 13 October 2023. This must be done by no later than 15 March 2024.

23.9 The applicant shall deliver her reply to the first respondent's supplementary affidavit dated 17 October 2023, by no later than 15 March 2024.

23.10 The applicant shall deliver her replying affidavit to the third and fourth respondents' answering affidavit dated 10 October 2023 by no later than 15 March 2024.

23.11 The respondents shall deliver their responses to the applicant's supplementary affidavits, if any, by 17 April 2024.

23.12 The applicant shall deliver additional written submissions and an updated practice note by no later than 10 May 2024.

23.13 The respondents shall deliver additional written submissions and an updated practice note by no later than 24 May 2024.

23.14 Should any party identify any factual disputes which in that party's view require a referral for the hearing of oral evidence, such party shall notify the other parties, the Office of the Deputy Judge President, or the allocated presiding Judge by no later than 24 April

2024. The relevant party may request that additional hearing days be allocated for the hearing of the oral evidence they consider necessary.

23.15 The party seeking the hearing of oral evidence shall immediately thereafter, and no later than 29 April 2024, request a case

management meeting with Deputy Judge President or the allocated presiding Judge in order that the parties, with the assistance of the relevant Judge, define the issues on which oral evidence is to be led and witnesses to be called.

23.16 The costs in the postponement application will be the costs in the main application.

S D J WILSON

Judge of the High Court

HEARD ON: 26 October 2023

DECIDED ON: 27 October 2023

For the Applicant:

M Feinstein

Instructed by

Alan Levin and Associates

For the First Respondent:

F Bezuidenhout

N Strathern

Instructed by Steyns Attorneys

For the Third and Fourth Respondents

D Moodliyar

The State Attorney

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