

SOUTH AFRICA / JUDGMENT

T.R.S.T v U.A.R and Others (019086/2023)

[2025] ZAGPJHC 399 (14 April 2025)

[2025] ZAGPJHC 399**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Senyatsi

CASE / FILE NUMBER

019086/2023

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Source record**FLYNOTES:**

FAMILY – Children – Relocation
– Mother
in South Africa illegally – Seeking to relocate to Israel
with two young boys – Father able to support
children and
his fiancé will assist with care – Concerns over war in
Israel and later conscription into army for the
boys –
Mother's potential income appearing insufficient –
Information provided regarding mother's
family in Israel not
indicating how the needs of the children will be dealt with –
Application dismissed with costs.

SAFLII
Note: Certain
personal/private details of parties or witnesses have been
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Policy
IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, JOHANNESBURG)
REPUBLIC
OF SOUTH AFRICA
CASE
NO: 019086/2023
(1)
REPORTABLE: NO
(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

In

the matter between: -

T[...]

R[...] S[...] T[...]

APPLICANT

And

U[...]

A[...] R[...]

FIRST RESPONDENT

NATIONAL

COMMISSIONER:

SOUTH

AFRICAN SECOND

RESPONDENT

POLICE

SERVICE

MINISTER

OF HOME AFFAIRS

THIRD RESPONDENT

DIRECTOR-GENERAL:

DEPARTMENT OF

HOME

AFFAIRS

FOURTH RESPONDENT

Neutral

Citation:

Delivered:

By transmission to the parties via email and
uploading onto Case Lines the Judgment is deemed to be delivered.

JUDGMENT

SENYATSI J

Introduction

- [1] This case involves the application for leave to permanently relocate two minor children, D and B, from the Republic of South Africa to Israel by their mother, an Israeli and an American citizen. She also requires, inter alia, that the first respondent be ordered to pay maintenance in respect of both minor children.

- [2] The first respondent, the biological father of the minor children and a South African citizen, opposes the application on the main ground that it is not in the interests of the minor children to permanently relocate with the applicant to Israel. The parties were never married to each other but lived together as partners. I had the benefit of listening to the oral expert testimonies on behalf of each parent from the 25 November to 29 November 2024 to assist me to decide on whether it was in the interest of the children to be relocated to Israel.

Background

- [3] The basis for the permanent relocation of the minor children to Israel by TRS is that her Spousal Visa, which she had obtained by virtue of her marriage which ended in divorce, has expired. She obtained a fraudulent Visa which resulted in her arrest and revocation and criminal conviction regarding the violation of the Immigration Act. Consequently, she is in South Africa illegally and therefore liable to be deported to Israel. It is for this reason that she brings an application to relocate with the two minor boys, who are still noticeably young, permanently with her to Israel.
- [4] The second respondent is cited because, Captain Alfred Robert Odendaal, a member of the South African Police Services is in possession of the applicant's Israeli passport. The Minister of Home Affairs and the Director- General are cited because the Minister is a Cabinet member responsible for the administration of Immigration Act, No: 13 of 2002 ("Immigration Act") and furthermore because the applicant prays that they be ordered to issue the passports for the two minor children for permanent relocation to Israel.
- [5] The parents of the minor children separated during 2022 after B was born. They both exercise the joint parental responsibilities and rights in terms of section 18 of the Children's Act, No: 38 of 2005 ("the Children's Act"). The contacts rights are exercised in terms of Madam Justice Francis-Subbiah's order dated 23 August 2022 following a recommendation by court-appointed forensic clinical

psychologist, Dr Robyn Fasser. The order regulates how the co-parenting rights in respect of the minor children are to be exercised. Dr Fasser recommended that the applicant be granted 19 sleep-over days per month and that the first respondent be granted 12 sleep-over nights per month. This is the current arrangement that has been put into place by the order referred to herein

- [6] Although there was an initial agreement between the parties for the joint appointment of Mr. L Carr (Mr Carr) as an expert to determine what is in the best interests of the minor children regarding their relocation, following a report written by Mr. Carr, which my brother, Wilson J, found was prejudicial to the applicant's case, he granted the postponement application so as to provide the applicant with the opportunity to respond thereto. Indeed, the applicant responded thereto and called for further report from Mr. Townsend as an expert to poke holes in Mr. Carr's report and to show why I should not consider the report. This led to the experts, that is Mr. Carr, Dr R. Fasser, DR. A. Townsend

giving evidence to assist the court to decide for or against the permanent relocation of the minor children to Israel.

- [7] In their joint minute following the meeting the experts held on 14 October 2024, they recorded that they agreed that they had all approached this matter from distinct positions and have different mandates. Dr. Fasser was a court appointed to conduct a care and contact evaluation, Mr. Carr was jointly appointed to conduct a relocation assessment and Dr. Townsend was appointed by Mr. Liebenberg, on behalf of Ms. Siman Tov, to provide a peer review of Mr. Carr's relocation assessment report. Therefore, they agreed that they could not host a discussion on points of agreement or disagreement in this matter as they all operated from different data sets and perspectives. The joint minute was issued unsigned and not helpful to me.
- [8] The applicant states that in Jerusalem, Israel, she will be living with her father Mr. I ST, until she can secure employment for herself, a right which she does not enjoy in South Africa because of her illegal immigration status. She contends that she is forced to leave the country and consequently, she would like to do so with the minor children. She states the first Respondent as the father of the minor children will have the right of contact with them and can visit them in Israel. She states that her father, who runs a business of supermarket in Jerusalem would be able to look after her and the minor children until she can find herself employment. She does not have a post graduate degree but rather a fashion design certificate which she obtained in South Africa when her immigration status was still valid. The immigration status became invalid when she divorced her former husband which led to the spousal visa expiring. Her father provided a sworn statement and confirmed that although as an observant Jew he would have liked his grandsons to have been circumcised, he would still be happy to live with them without the circumcision. He states that he lives in a large house which can accommodate his grandchildren. He furthermore states that he did give financial support to the applicant around January 2023 in the sum of R14 000 assist her with her legal bills. He has never met his grandchildren.
- [9] The first respondent, R, contends that the minor children's interests will be best served if they are allowed to remain with him in South Africa. He is an attorney who runs a practice that generates enough income to be able to continue maintaining his children with the contact and visitation to the children being given to the applicant. His fiancé has agreed to help him look after the children and has filed a sworn statement to that effect. He contends that he has a helper who works full time for him at his home which is a free-standing house with enough rooms to accommodate the children. He states that the children are used to his extended family members and that they are quite used to the lifestyle in South Africa as opposed to having to adjust to a new lifestyle where the applicant or her father will not be able to employ a helper to assist in meeting the needs of the children. He also laments that Israel is a violent country involved in a war not just with Hammas but with most of its neighbours and that the constant fear of bombs or rockets being fired at Jerusalem and other cities make it too risky for the children to be moved there.

The

issues

[10] The issue for determination was whether it would be in the interest of the minor children to either relocate permanently to Israel with the applicant or to remain in South Africa with the first respondent.

The legal principles

[11] Section 28(2) of the Constitution states that child's best interests are of paramount importance in every matter

concerning the child. In keeping with the Constitution, the Legislature passed the Children's Act 38 of 2005 ("the

Act") and section 7 of the Act deals with the best interests of the children. Section 7 states that whenever the interests of children are involved, the Court should always consider the factors mentioned in the section.

[12] The guiding principles applicable in relocation of minor children was stated by Scott JA in *Jackson v Jackson*[1] to be as follows:

"It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that generally speaking where, following a divorce, the custodian parent wishes to emigrate, a court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be bona fide and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same and while past decisions based on other facts may provide useful guidelines, they do no more than that. By the same token care should be taken not to elevate to rules of law the dicta of judges made in the context of the peculiar facts and circumstances with which they were concerned. In my judgment the present case is one of those in which in all the circumstances leave to take the children out of the country should have been refused."

[13] In deciding whether or not relocation will be in the child's best interests the court must carefully evaluate, weigh and balance a myriad of competing factors,[2] including the child's wishes in appropriate cases.[3] It is an unfortunate reality of relationship breakdown that the former spouses must go their separate ways and reconstitute their

lives in a manner that each chooses alone. Maintaining cordial relations, remaining in the same geographical area and raising their

children together whilst rebuilding their lives will, in many cases, not be possible.[4]

[14] In *F v F*[5] Maya AJA (as she then was) stated as follows:

“It is also important that courts be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts – who have no reciprocal legal obligation to maintain contact with the child and may relocate at will[6] – may, and often does, indirectly constitute unfair gender discrimination. Despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender based.[7] It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce. The refusal of relocation applications therefore has a potentially disproportionate impact on women, restricting their mobility and subverting their interests and the personal choices that they make to those of their children and former spouses.”

[15] There is no doubt that the children are attached to both parents and for that reason, the court should adopt a neutral approach to determine what is in the best interests of the children. Consequently, it makes sense that in the context of relocation disputes, a pro-relocation approach[8] which is underscored by a presumption in favour of the primary caregiver (and also not the mother as such), cannot apply in the case of joint caregivers as in this case.

[16] Where a neutral approach is adopted[9], there is neither a presumption in favour of or against relocation and a court applies a fresh inquiry into each case as it arises. On a case-by-case discretionary basis, a court must review a proposed move in terms of the children’s best welfare and interests.

[17] In *Cunningham v Pretorius*[10], Murphy J held that in deciding relocation disputes:

“What is required is that the court acquires an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the court must render a finding of mixed fact and opinion, in the final analysis a structured value-judgment, about what it considers will be in the best interest of the child.”

[18] In *S v M*[11], Sachs J said the following in relation to the inquiry into the best interest of the children:

“Section 28(2) of the Constitution provides that “[a] child’s best interests are of paramount importance in every matter concerning the child.” South African courts have long had experience in applying the “best interests” principle in matters such as custody or maintenance.[12] In our new constitutional order, however, the scope of the best interest’s principle has been greatly enlarged.”[13]

[19] Sachs J[14] continued as follows in further articulating the best interests of the children’s principles as recognized in section 28 of the Constitution:

*“Yet this Court has recognised that it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. Thus, in *Fitzpatrick* this Court held that the best interests principle has “never been given exhaustive content”, but that “[i]t is necessary that the*

standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.’,[15] Furthermore ““(t)he list of factors competing for the core of best interests [of the child] is almost endless and will depend on each particular factual situation’.” Viewed in this light, indeterminacy of outcome is not a weakness. A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”

- [20] Although the Constitutional Court was concerned with the sentencing of the primary caregiver of the minor children, the principles on the approach of the best interests of the minor children were properly articulated in that case. Accordingly, each case will be determined according to its unique facts on matters of relocation with joint parenting. The court concerns itself with the rights and interests of the minor children and not those of the parents. The court as an upper guardian of the minor children, exercises its discretion in deciding on what is in their best interests, and the discretion must be done judicially considering the circumstances of each case and the evidence before it.

The evidence

- [21] Both parents exercise co-parenting of the minor children and the children are equally attached to both. This is according to the reports by Dr. Fasser and Mr. Carr. Both experts conclude that the separation from one of the parents by the minor children will have a serious adjustment issue for the minor children. Dr Fasser is neutral on the issue of relocation and despite the medical mental condition of the applicant, she concludes that the applicant has good parental qualities. She comes to the same conclusion regarding the first respondent who she says also has good parental qualities.
- [22] Mr. Carr takes a view that it will not be in the interest of the children to be relocated to Israel. He maintains in his evidence that he is biased against the children moving to Israel because of the war that is taking place in Israel. He states that as an observant Jew whose own children live in Israel, it is going to be a serious challenge for the minor children to be accepted by the applicant's father even though the father claims that he will accept them even without circumcision. He argued after serious cross-examination that although he did not qualify his report that he never interviewed the extended family members of the applicant, he sees no reason why his views will change with regards to what is in the best interest of the minor children. He maintained that although his own grand children live in Israel, it would be difficult for the minor children who had never met any extended family member of the applicant to adjust to the new environment with is besieged by the violence of the war.
- [23] Mr. Townsend criticises the report of Mr. Carr as biased and one sided and that it fails to meet the standard of neutrality and that it should be ignored in its entirety.

Reasons

- [24] As alluded to above, the interests of the children are a paramount consideration when determining whether to permit their relocation to Israel or not. It is public knowledge that indeed the state of Israel participates in the fight against Hamas following the attack by Hamas on Israel citizens that claimed over one thousand Israeli lives. In retaliation, it is also public knowledge that the retaliation by Israel on Hamas has claimed well over 61,700[16]. Following the killings, there are reported rocket attacks on Jerusalem and Tel Aviv Cities by Hamas and Iran which force the Israel citizen to seek refuge in bomb shelters.
- [25] The applicant is not employed although she now claims that she has a job offer with a gross earning of Israeli NIS 9500. There is no clarity on what the living expenses would be and how much will the children be provided for from her side. The amount is clearly insufficient. She claims R40 000 maintenance per month for both boys. It also not clear on how the grandfather would assist the children until she can secure employment. There are also not details of the helper if she secures employment. The information concerning the kinder garden is inadequate.
- [26] She states that on arrival in Israel she will stay with the children's maternal grandfather, who according to the applicant, was an absent father when she grew up as he was divorced from the applicant's mother. In fact, since the minor children were born, their maternal grandfather has never met them although he claims by ways of an affidavit that he is willing to take care of
- them. The town they will relocate to once applicant secures employment, is called Modi'in and is 60 km from Gaza strip. This is where the father of the applicant's supermarket is located. Her brother, A, commutes daily between Modi'in
- and Jerusalem and works from 11h00 to 21h00 which covers 72 km round trip. The applicant's only brother also works at the
- supermarket and works on weekends. It is unlikely that he will be able to provide any support to the minor children because when
- returns from work, the boys will most likely be asleep.
- [27] The children's grandfather also works in Modi'in the same working hours as their uncle. It is not likely that they will be able to support the children. Their maternal grandmother does not live with their grandfather. She is a hairdresser and lives in a one-bed room apartment. She also works as a radio presenter to make ends meet. It is not likely that she will be able to support the grandchildren. The applicant has three sisters G, Y and T who have 19 children between them. They also live in Jerusalem. D has only met four sons of T when he was 20 months old. B has never met any of the applicant's siblings.

[28] Two of the applicant's sisters, G and T, live in Beith Shemesh, which is approximately a 70km round trip with a car, or takes 1 hour and 10 minutes one way by train, which is more than two hours on a train for a round trip. These two sisters have thirteen children between them. The mother's oldest sister, G[...], has nine children. They will live far from each other and people have their own lives and their own interests and need to look after their own children. I have not been informed by the applicant as to how the needs of the minor children will be dealt with.

[29] The applicant states that the children will have access to good schools but provides no information of what the costs of those

schools will be and what benefit will the minor children derive from the schools. No information has been provided with the neighbourhood

safety relating to the minor children. Consequently, with insufficient information from the applicant, it is difficult for the

court determine the best interest of the minor children.

[30] When the children turn 18 years of age, they will be conscripted into the Israeli arm as required by the law of Israel. Since the Israeli Declaration of Independence in 1948, fixed-term military service has been compulsory in Israel.[17] The draft laws of the Israel Defence Forces (IDF) only apply to Jews (males and females), Druze (males only), and Circassians (males only). I am not persuaded that it will be in the best interest of the minor children to be relocated permanently to Israel with the applicant. Doing so would potentially expose the minor children to potential harm due to the ongoing conflict in Israel.

[31] The situation of the minor children if they are not allowed to relocate can be summed as set out herein. They will live with their father, as the caregiver in his home. His fiancé has indicated her willingness to assist the first respondent in raising them up. They will have access to accommodation ably provided by the first respondent who is gainfully employed and run his own law practice. He is currently maintaining them alone and they are exposed to a lifestyle according to the means of the first respondent. The children know the first respondent's extended family members due to their visits with their father. Compared to Israel, South Africa has not conscription laws and consequently, when they turn 18 years of age, they will continue to live as civilians as opposed to being soldiers unlike in Israel.

[32] Counsel for the applicant has submitted that I should, when I determine the relocation, consider who between the applicant and the respondent is able travel based on affordability. He contended that the first respondent, due to his financial means, can travel; has the flexibility to travel, can afford to travel and where contact can be made. He submitted that the court should therefore grant leave to the minor children to permanently relocate to Israel because their father would be able to travel to exercise his contact rights as he has the flexibility and can afford to travel Israel.

- [33] Mr. Liebenberg for the applicant, spent a significant amount of effort in the heads arguments on why I should reject Mr. Carr's evidence and report because of his bias against the relocation of the minor children. I have considered his submissions and based on the papers before me and even if I am with him in his criticism of Mr. Carr, I have not been persuaded by the applicant that the best of the children will be well served by the permanent relocation of the minor children to Israel with the applicant.
- [34] I am alive to the fact the refusal will have an adverse impact about separation of the minor children from the applicant but that under the circumstances of this case, the court must exercise its discretion to rise above the conflicting interests of both parents and grant an order which will be guided by the best interests of the children as required by section 28(2) of the Constitution.
- [35] Furthermore, the submissions made on behalf of the third and fourth respondents are noted and I will not deal with them.

Order

[35] Having heard counsel for both parties the following order is made:

- (a) The application is dismissed with costs.
- (b) The second respondent is ordered to immediately hand over the Israeli passport of the applicant back to her.

ML SENYATSI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD:04 December 2024

DATE JUDGMENT HANDED DOWN:14 April 2025

APPEARANCES

Counsel for the Applicant: Mr A Levin

Instructed by:

Allan Levin and Associates

Counsel for the first Respondent:

Adv F. Bezuidenhout

Instructed by:

Steyns Attorneys

Counsel for the 3rd and 4th Respondents: Adv D Moodliyar

Instructed by:

The State Attorney

[1]

[2001] ZASCA 139; 2002 (2) SA 303 (SCA) para 2 of the majority

judgment.

[2] See e.g. *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C).

[3] In terms of one of the key tenets of the United Nations Convention on the Rights of the Child, the courts must “assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child” (article 12). Thus, if the court is satisfied that the child in question has the requisite intellectual and emotional maturity to make an informed and intelligent judgment, then the court should give serious consideration to the child’s expressed preference (see *McCall v McCall* 1994 (3) SA 201 (C) at 207H–J).

[4] *F v F* [2006] 1 All SA 571 (SCA) para 10.

[5] Footnote 4 above at para 12

[6] Elsje Bonthuys “Clean Breaks: Custody, Access and Parents’ Rights to Relocate” (2000) 16 SAJHR 487 refers in this regard to “a systematic lack of reciprocity when dealing with the parents of the child. While the custodian may be prevented from relocating by the interests of the children, the non-custodian may relocate at will. While the custodian can be compelled to facilitate access to the child, the non-custodian parent cannot be compelled to contact the child, whether such contact would be beneficial to the child” (at 496).

[7] See e.g. the remarks of several judges in the Constitutional Court case of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) paras 37–38 (per Goldstone J), [also reported at [1997] ZACC 4; 1997

(6) BCLR 708 (CC) – Ed] paras 80 and 83 (per Kriegler J), para 93 (per Mokgoro J) and paras 109–110 and 113 (per O’Regan J).

[8] *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) 439G–H; *Godbeer v Godbeer* 2000 3 SA 976 (W) 982C–983A; *Jackson v Jackson* 2002(2) SA 303(SCA) para 2 and 34 and *F v F* 2006 (3) SA 42(SCA) para 13.

[9] Domingo, W; “For the sake of the children”: South African family relocation disputes” Potchefstroom Electronic Law Journal PER vol. 14 n.2 Potchefstroom Jan.2011

[10] 2008 JDR 1022 (T) par 9; see also *UR v SB* 2024 JDR 0238 (GJ) par [18].

[11] (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) para 12

[12] The best interests of the child principle was articulated as long ago as 1948 by the Appellate Division in *Fletcher v Fletcher* 1948

(1) SA 130 (A), and has since found application in numerous judgments. Section 7(1) of the Children's Act 38 of 2005, parts of which entered into force on 1 July 2007 and replaces the Child Care Act 74 of 1983 and Children's Act 33 of 1960, sets out a lengthy list of factors for courts to consider when determining a child's best interests under the Act and under

the Constitution. Such factors include, but are not limited to, the nature of the personal relationship between the child and the parents; the child's physical and emotional security; the need for a child to be brought up within a stable family; and the relevant characteristics of the child. See also Barrett and Burman "Deciding the best interests of the child: an international perspective on custody decision-making" (2001) 118 SALJ 556 at

560. Compare Bennett "The best interests of the child in an African context" (1999) 20 Obiter 145 at 150-1 stating that protecting the interests of the family was indirectly protecting the interests of children, who like other individuals were not thought of as rights-bearers in the customary context.

[13] See for instance *Brandt v S* [2005] 2 All SA 1 (SCA) at paras 15-6.

[14] Para 24 of the case.

[15] Above n 15 at para 18 of the Constitutional Court judgment.

[16] www.aljazeera.com.news

[17] www.jpost.com

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