

SOUTH AFRICA / JUDGMENT

T.S v S.D (7389/2023) [2023] ZAWCHC 288 (20 November 2023)

[2023] ZAWCHC 288**COURT**

Western Cape High Court, Cape Town

BEFORE

Holderness

CASE / FILE NUMBER

7389/2023

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Policy**FLYNOTES:**

FAMILY – Children – Relocation – Parties are divorced – Incorporated parenting plan agreed between parties – Law firm requires applicants partner to resume role at Dubai office as soon as possible – Voice of children – Reported that Dubai has become familiar to them and felt like home after week-long holiday – Expressed a keenness to relocate to Dubai – Family Advocate found that it would mitigate against children's best interests if she were to relocate without them – Applicant is children's primary attachment figure – Applicant has carefully weighed and balanced reasonableness of her decision to relocate – Decision is both bona fide and reasonable and relocation is in best interests of children – Relocation granted – Children's Act 38 of 2005.
IN
THE HIGH COURT OF SOUTH AFRICA

(WESTERN
CAPE DIVISION, CAPE TOWN)
Case
number: 7389/2023

In the matter between: T
S
Applicant
and
S
D
Respondent
Date

of hearing: 19 October 2023
Further
submissions filed: 4 November 2023
Judgment

delivered: 20 November 2023

JUDGMENT

DELIVERED ELECTRONICALLY ON 20 NOVEMBER 2023

HOLDERNESS AJ

INTRODUCTION

[1] The applicant, the mother of two minor children, S, who is 15 years old, and K, who is 11 years old ('the children'), seeks the following relief:

1.1 An order granting her permission to remove the children permanently from the Republic of South Africa ('RSA') to reside with her and her fiancé, G J ('G J') in Dubai, United Arab Emirates ('UAE');

1.2 An order directing that the further provisions of the notice of motion, in respect of the exercise of the parties' parental responsibilities and rights regarding the children, substitute the relevant provisions of the divorce order granted and parenting plan entered into by the parties;

1.3 An order directing that the terms and provisions of the Consent and Maintenance Order granted on the 31 May 2018 in the Verulam Magistrate's Court, in respect of maintenance for the children, shall remain of force and effect; and

1.4 Costs of this application on a scale as between attorney and client.

BACKGROUND

[2] The parties were previously married to each other. They were divorced on 19 January

2016. The children, who were born of the marriage, were 8 and 3 years old respectively when their parents divorced. At the time of the divorce both parties resided in Durban.
- [3] In terms of the divorce order incorporating the parenting plan agreed between the parties, the parties remained co-holders of parental rights and responsibilities, and were to be involved and make joint decisions in regard to schooling, extramural activities, medical care and removal of the children from South Africa, other than during holiday periods.
- [4] The children's primary residence was to be with the applicant. The respondent would have contact with the children on alternative weekends, and for half of the school holidays.
- [5] The applicant and the respondent separated on 30 January 2015. For the past eight years, the children have resided primarily with the applicant.
- [6] When the respondent resided in Durban, he saw the children on a regular basis. In August 2016, the respondent relocated to Johannesburg, where his extended family reside. After the respondent relocated, the children did not spend full weekends with him, however they did spend half of the school holidays with him.
- [7] The respondent has paid maintenance of R10,000 per month per child to the applicant since a maintenance order was taken by consent between the parties on 31 May 2018. The applicant has borne the cost of all of the children's educational and medical expenses, and the shortfall of their day-to-day expenses not covered by the maintenance paid by the respondent.
- [8] The respondent subsequently purchased an apartment in Durban. He alleges that this was to facilitate his contact with the children, and disputes the averment by the applicant that the children only spent three weekends with him at the apartment before the applicant relocated with the children to Cape Town in March 2019.
- [9] In March 2019, the applicant relocated to Cape Town with the children as the children did not spend regular weekend time with the respondent, who continues to reside in Johannesburg, the applicant's view was that the move to Cape Town would not adversely impact on the respondent's contact with the children.
- [10] Upon relocating to Cape Town, the applicant agreed to pay for flights and accommodation for the respondent to visit the children in Cape Town during term time. The respondent paid for tickets for the children to visit him, and also flew to Cape Town to visit them, without asking the applicant to fund his flights or accommodation.
- [11] With the respondent's prior approval and consent, the applicant enrolled the children at the A[...] I[...] S[...] of C[...] T[...] ('AISCT'). By all accounts the children have flourished at AISCT, and are outgoing and well-rounded. Both the parties are desirous of the children undertaking their tertiary studies overseas.

- [12] The applicant and the respondent both have new life partners. The respondent is married to N Z, and the applicant is engaged to G J, an American citizen, whom she met and started dating in early 2020.
- [13] The children have developed a close relationship with G J, who helps to care for them, and who has taken an active interest in their schooling, sport and social activities. For the past eighteen months the children have resided with the applicant and G J in Steenberg Estate, Cape Town.
- [14] In January 2023 the applicant and the children travelled to the USA with G J. They met his mother, sister and other members of his extended family.

THE PROPOSED RELOCATION TO DUBAI

- [15] During lockdown and to date, G J, a consultant to a London based law firm, has run his practice from Cape Town. The law firm, however, now require him to resume his role at their Dubai office as soon as possible.
- [16] The applicant first discussed the possibility of relocation with G J in 2021, she advised the respondent at that time, that she was considering relocating to Dubai.
- [17] The applicant decided not to pursue relocation at this time, as she could not bear to relocate without the children, and did not have the resources to litigate should the respondent oppose such relocation.
- [18] When the question of relocation arose again at the end of 2022, the applicant unilaterally raised the issue with the children, to hear their views about a potential relocation.
- [19] The respondent became aware of the applicant's renewed plans to relocate before she raised it with him formally and was (understandably) affronted when he found out that the children were interviewed by a school online in Dubai before the applicant had discussed the issue with him. The applicant's reasoning was that she should first explore whether the move was feasible, before raising it with the respondent.
- [20] The respondent contended that the applicant's failure to consult with him prior to take steps towards relocating was contrary to the provisions of the parenting plan, the Children's Act 31 of 2005 ('the Act') and was done without the involvement of the Family Advocate or an independent professional. These are the reasons cited by him for his opposition to the proposed relocation. A repeated refrain by the respondent is that the applicant has attempted to undermine his role and responsibilities towards the children.
- [21] The respondent's evidence is that he found out about the relocation on a call with K, who said to him: "Dad, do you know that we are going to Dubai and that we have been accepted at a school there?" The respondent thereafter corresponded via email with G J and expressed his disappointment that this correspondence emanated from G J, and not from the applicant. The respondent's view was that the applicant's approach was disrespectful of him. It is indeed unfortunate that the applicant chose to take formal steps to enrol the children at

a school in Dubai without discussing this aspect and any details of the proposed relocation with the respondent.

[22] Suffice it to say that the ongoing conflict between the parties, which has culminated in an action before this court regarding outstanding financial issues arising from the divorce action, has undermined any prospect of this matter being amicably resolved.

[23] At paragraph 48 of his answering affidavit the respondent states as follows:

“Let me be clear. I am not opposing the Applicant’s relocation to join her partner in Dubai. My bone of contention is that if the Applicant decides to relocate with the children my rights as contained in the Divorce Settlement Agreement, the Original Parenting Agreement and the Divorce Order must be respected. Secondly, what constitutes the best interest of the children must be independently evaluated by the Family Advocate or any independent professional particularly having regard to the number of relocations that these children have encountered in their lives, and the impact of my permanent detachment from them as their father must be considered.”

[24] The respondent further contends that the divorce settlement agreement, incorporating the parenting plan, is binding on the parties, and in terms of clause 17 thereof, cannot be varied unless such variation is reduced to writing and signed by both parties.

[25] The respondent indicated that he is willing to relocate to Cape Town should the applicant decide to relocate without the children, to ensure continuity for them in their schooling, social and sporting lives.

[26] Lastly, the respondent avers that the applicant’s failure to give due consideration to his views regarding the proposed relocation falls foul of Section 31(2)(a) of the Act.

[27] The applicant’s reasons for wanting to relocate are as follows:

27.1 She has always been the children’s primary caregiver

27.2 She is in a permanent relationship and engaged to be married to a man with whom she has been in a relationship for almost four years;

27.3 She and the children have formed a family unit with G J, with whom the children enjoy a good relationship;

27.4 It is her wish to live with both her fiancé and her children;

27.5 She is able to continue with her current employment on the boards of various companies and in addition, broaden her career opportunities, which is not an unreasonable aspiration as she contributes significantly to the children’s financial support;

27.6 The children will have the opportunity and privilege of living in a society that is able to offer them what Dubai is able to offer and have been enrolled in an International school with excellent credential close to a number of upmarket housing estates;

27.7 The respondent would continue to have holiday contact with the children for two-thirds of their holiday time, in excess of what he currently has;

27.8 The respondent has for the most part not been involved in the children's education and extra-mural activities and this will not change in the event of relocation; and

27.9 She has tendered the costs of two return flights per child per annum.

[28] The applicant contends that the respondent has failed to raise any legitimate concern regarding the impact of the proposed relocation on the interests of the children, their living conditions, schooling, social or personal lives.

THE VIEWS AND WISHES OF S AND K

[29] Section 10 of the Act provides that:

‘[E]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.’

[30] According to the applicant, she has considered the views and wishes of the children regarding the proposed relocation, and they have both told her that they wish to relocate to Dubai with her and G J, in the full knowledge that there will be challenges ahead of them. The children have conveyed their views in this regard to the respondent directly.

[31] To ensure that the children's views were expressed independently, Ms Hannington of Norman Wink & Stephens and Adv van Embden of the Cape Bar, both of whom have extensive family law experience, were appointed as legal representatives for the children.

[32] Section 28(1)(h) of the Constitution of the Republic of South Africa (the ‘Constitution’) provides that:

‘(e)very child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.’

[33] Section 8(1) of the Act provides that ‘(t)he rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights.’

[34] Section 14 of the Act provides that ‘(e)very child has the right to bring and to be assisted in bringing a matter to a court provided that matter falls within the jurisdiction of that court.’

[35] Section 14 of the Act, which is broader in scope than section 28 of the Constitution, does not limit a child's right to legal representation to cases in which substantial injustice would otherwise occur:

‘Nothing stated in this section, in my view, places any constraint upon this court to determine the manner in which a child is to bring a matter before it all the way in which the child should be assisted. The paramount consideration in determining such issues remains the best interest of the child concerned..’[1]

[36] Unlike the Office of the Family Advocate (‘the Family Advocate’), which provides a professional and neutral channel of communication between conflicting parents, the child and the Courts, the legal practitioner representing the child:

‘...stands squarely in the corner of the child and has the task of presenting and arguing the wishes and desires of that child the legal

practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child's perspective the legal practitioner may provide the child with the voice but is not merely a mouthpiece,’[2]

[37] Mr van Embden handed up written and supplementary submissions, setting out the views of S and K, as follows:

37.1 They both have a very close and loving relationship with the applicant;

37.2 They have a very close relationship with each other and play sports together;

37.3 They are close to the respondent, who they enjoy being with nearly every holiday. S said about his dad: ‘We are close, but it is different to my mom. My dad is funnier, and I can talk to him about sports’;

37.4 K says that he enjoys doing things with his dad, such as go karting, going to the movies and Easter egg hunts. He said that when he spent time with his father, it was usually also with S and N Z (the respondent’s wife), but that sometimes they were joined by cousins.

37.5 They both have a good relationship with G J, who sometimes helps them with their homework and with whom they play golf;

37.6 They are ‘fine’ with the applicant and G J getting married;

37.7 They have WhatsApp/FaceTime contact with the respondent approximately three times a week, for five to ten minutes at a time, and are of the view that they would remain very close to him if they relocated to Dubai;

37.8 The children referred to a holiday with the respondent to Dubai in July 2022. They said that they were both impressed with Dubai. S said that it is ‘clean and organised with great facilities and that everything works.’ K said: ‘I loved it - Dubai is beautiful. It has great restaurants and nice people it was my favorite place before I even knew I was moving there;’

37.9 They had discussed the matter with their father and told him that they wanted to go. Both reported that their father did not like the idea of them moving so far away, and said that ‘maybe he would see them less’;

37.10 Both children appeared to be well informed about where they would be living in Dubai and going to school. They have both done the virtual tour of D A[...] s[...] (‘DAS’). S realises that there will be quite a big adjustment for him going into Grade 10, however he sees this as a challenge. K does well at school and is confident that he will have no difficulty starting grade 5 at DAS; and

37.11 When asked how they would feel if the applicant and G J relocated to Dubai without them and they were to reside full time with their father, either in Cape Town or Johannesburg, S said he prefers to go with the applicant to Dubai, but if he has to live with the respondent, ‘that would be OK.’ However, he emphasised that this would not be acceptable for K, and that K needs the applicant. K said: ‘I’ll be angry if we can’t go. I’d be sad if I had to live with my dad full time in Johannesburg.’

[38] The children’s legal representatives filed a supplementary report after the children returned from a week’s holiday in Dubai with the applicant and G J. They reported that Dubai has now become fairly familiar to them, and that Dubai ‘felt like home’. S enjoyed that they were able to mix with other South Africans who lived there. Both boys still expressed a keenness to relocate to Dubai. S expressed strong wishes to relocate in time for the start of the second semester of Grade 10 in January 2024.

[39] Lastly, both children reiterated that they did not think there would be any difference in their relationship with the respondent should they relocate. They both said that, if possible, they would like to see their father with the same frequency and for the same periods of time as they do currently, which they said was about four to five times a year.

THE APPLICATION FOR A POSTPONEMENT AND THE CONCERNS RAISED BY THE RESPONDENT REGARDING THE PROPOSED RELOCATION

[40] The respondent appeared in person after his erstwhile attorney, Mr. Maponya, indicated in August 2023 that he was not available to argue the matter on the postponed date, and accordingly withdrew as the respondent’s attorney of record.

[41] The respondent informed the Court that he was unable to secure alternative legal representation for the hearing on 17 October 2023. Ms McCurdie SC, who appeared for the applicant, submitted that it appears from the affidavits and heads of argument filed by the respondent, that he has been legally assisted, albeit not formally.

[42] The respondent has had ample time to secure the services of a new attorney, and to instruct an expert to conduct an assessment. He has been aware of the proposed relocation since March 2023, and these proceedings were instituted on 10 May 2023.

- [43] It is trite that matters involving minor children involve a degree of urgency and both parties, and the minor children in particular, will benefit from a determination being made regarding the proposed relocation.
- [44] Mr. van Embden's view regarding the application for a postponement was that any continued uncertainty regarding the proposed relocation was likely to negatively impact the children. He canvassed the issue directly with the children and they both expressed dismay at the possibility of the matter being further delayed. S was concerned about a delay negatively affecting his schooling as he is hoping to start the new term for Grade 10 on 2 January 2023.
- [45] In light of the above and as Acting Judge President Goliath had already directed that the latest date upon which the matter was to be heard was 19 October 2023, and as the respondent had already delivered his answering affidavit, which fully set out the facts upon which he relies for his opposition, had duly filed his heads of argument, and the Family Advocate report was delivered two days before the hearing, I was of the view that the matter was ripe for hearing. I accordingly refused the postponement and directed that the matter should proceed.
- [46] The main thrust of the respondent's argument was that the matter was not ripe for hearing as he had not had sufficient opportunity to appoint a childcare expert to conduct an assessment and to secure the services of an attorney.
- [47] A consistent theme which emerged is that the respondent feels that his views as the children's father have not properly been considered and that he has been disrespected in the process. It is indeed unfortunate that the applicant discussed the proposed relocation with the children and took steps to enroll them in DAS prior to discussing the matter with the respondent and taking his views into account. It is, however, apparent that the respondent seems less focused on whether the move is in the best interests of the children than one would hope he would be.
- [48] The respondent further expressed concern that his right to have contact with the boys would be thwarted by the applicant and that it would be difficult to obtain a mirror order which could be enforced in Dubai. He is of the view that the children have already been uprooted by the move from Durban to Cape Town, and now the applicant wishes again to relocate. He feels that it is highly likely that should Johnson's work require him to move again, this will result in a further move and disruption for the children.
- [49] Lastly the respondent argued that S did not wish to relocate. This was raised by him for the first time at the hearing and is not borne out by the evidence before the Court or by the findings of the Family Advocate.

THE REPORT OF THE FAMILY ADVOCATE

[50] On 17 August 2023 Acting Judge President Goliath granted an order directing the Family Advocate to file its report in this matter on or before 31 August 2023. If either of the parties appointed an expert, then such expert's report was to be filed on or before Thursday, 14 September 2023. In terms of this order, the applicant could file a supplementary affidavit on or before Tuesday, 19 September 2023, and the respondent on or before 26 September 2023.

[51] The matter was subsequently enrolled for hearing on 19 October 2023. The report of the Family Advocate, dated 16 October 2023, was only made available to the parties two days before the hearing on 17 October 2023.

[52] Due to the late filing of the report of the Family Advocate, the respondent was granted an opportunity to file a note regarding the report should he wish to do so by 2 November 2023, and the applicant by 4 November 2023. The respondent filed further submissions on 2 November 2023, and a supplementary note was filed by the applicant dealing with the issue of the enforceability or registration of an order by this Court in Dubai, as requested by the Court at the hearing.

[53] The Family Advocate in its report in the present matter observed as follows:

53.1 Whilst the Children's Act does not provide criteria specifically for dealing with relocation matters, the best interests of the minor child/ren remain central in determining whether a relocation order should be granted. The other factors which also play a role in relocation applications are:

53.1.1 Does the application for relocation appear to be a reasonable and bona fide request?

53.1.2 the best interest of the child/ren;

53.1.3 the age, developmental needs, and adjustment of the child/ren;

53.1.4 whether the relocating parent is likely to foster the continued relationship between the child and the parent left behind;

53.1.5 the likely effects of moving on the child's social and familial relationships; and

53.1.6 the culture and educational opportunities in both locations.

[54] The Family Advocate emphasised that the position of the primary caregiving parent cannot be underplayed. When dealing with relocations, our courts have the difficulty of considering the proposed location, potential opportunities and in certain cases imponderables when determining what is likely to be in the best interest of the minor child/ren.

[55] After conducting a full investigation, the findings of the Family Advocate were inter alia as follows:

55.1 The minor children share a bond and close attachment with both parents, however their primary attachment is to the applicant, who has always been present and provided for their daily needs;

55.2 The negative attitude displayed by the parties towards each other is cause for concern. For the applicant and respondent to co-parent the minor children more effectively, their attitude towards each other needs to change, and the best interests of the minor children placed at the forefront;

55.3 The children appear to gravitate towards the applicant, as they feel she meets all their needs;

55.4 Relocation is not new to the children, and the parents have found ways to ensure that the children maintain contact with the respondent;

55.5 The children are of an age and level of maturity to participate in decisions regarding their care and contact, and due regard should be given to their views;

55.6 The applicant does not appear to be trying to alienate the children from the respondent;

55.7 The children are genuinely eager to relocate with the applicant to Dubai; and

55.8 The parties agree that the move to Dubai may offer great opportunities to the children.

[56] According to the Family Advocate, there is no evidence that the applicant has any intention of restricting or frustrating the respondent's contact with the children in the future. Due cognisance was taken of the fact that there was no suggestion since the parties had separated that the applicant had frustrated the respondent's contact with the children.

[57] Significantly, the Family Advocate indicated that in its view the applicant would comply with any order regulating care and contact arrangements.

[58] The Family Advocate further found that as the applicant is the children's primary attachment figure, if she were to relocate without them it would mitigate against their best interests.

CHILD RELOCATION – THE LEGAL POSITION

[59] The criterion consistently applied by the Courts in deciding relocation matters is entrenched in s 28(2) of the Constitution which provides that:

'(a) child's best interests are of paramount importance in every matter concerning the child'. The 'best interests of the child' standard is, however, of necessity an indeterminate and relative one as the circumstances of each child within each family unit will vary across a wide spectrum of factors.[3]

[60] The legal principles applicable in relocation cases were set out by the Supreme Court of Appeal in the majority

judgment of Scott JA in *Jackson v Jackson*[4] 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.'

[61] In deciding whether or not to allow a parent to relocate, the Court must balance several competing factors in deciding whether or not relocation will be in the child/ren's best interest. The following extract from the judgment of Miller J in *Du Preez v Du Preez*[5] is apposite:

'[T]his is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside; indeed, the Court takes upon itself a grave responsibility if it decides to override the custodian parent's decision as to what is best in the interests of his child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian

parent's decision and the emotions or impulses which have contributed to it.'

[62] The reason for this is explained in the minority judgment of Cloete AJA in the Jackson case *supra* as follows:

'The fact that a decision has been made by the custodian parent does not give rise to some sort of rebuttable presumption that such decision is correct. The reason why a Court is reluctant to interfere with the decisions of a custodian parent is not only because the custodian parent may, as a matter of fact, be in a better position than the non-custodian parent in some cases to evaluate what is in the best interests of a child but, more importantly, because the parent who bears the primary responsibility of bringing up the child should as far as possible be left to do just that. It is, however, a constitutional imperative that the interests of children remain paramount. That is the "central and constant consideration".'

[63] As observed by Maya AJA in *F v F* *supra*, from a constitutional perspective, the rights of the custodian parent to pursue his or her own life or career involve fundamental rights to dignity, privacy and freedom of movement[6]:

'Thwarting a custodian parent in the exercise of these rights may well have a severe impact on the welfare of the child or children involved. A refusal of permission to emigrate with a child effectively forces the custodian parent to relinquish what he or she views as an important life-enhancing opportunity. The negative feelings that such an order must inevitably evoke are directly linked to the custodian parent's emotional and psychological well-being. The welfare of a child is, undoubtedly, best served by being raised in a happy and secure atmosphere. A frustrated and bitter parent cannot, as a matter of logic and human experience, provide a child with that environment.'

[64] The Court further pointed out that:

‘(d)espite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender-based. 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. [7]’

[65] Child relocation cases are difficult and often finely balanced cases, with everything to win and lose. Relocation will, in most cases, mean the child is no longer able to spend the same amount of time with the remaining parent. Therefore, the effect of relocation where the child has been spending a similar amount of time with each parent is even more marked and will have a significant impact on the nature and quantity of time the child will spend with the other parent. For this reason, it is likely that relocation applications will be more difficult in circumstances where a shared care arrangement is in place.[8]

[66] In the case of *Shawzin v Laufer*[9] the court recognised that if the children were to leave the country, it would result in a disruption of the close contact they had with their father, who would remain behind. Nonetheless, the court highlighted the following compensatory factors:

“... The bond between them and their father will not be broken. He will have them every year for a long holiday of six weeks and he is in a position, financially, to see them in Canada at other times... To take them away from their mother who has looked after them since their birth, would obviously have serious psychological consequences. They are still of an age when they would call for their mother first if something were to happen to them..’

[67] As there is no legislative framework to provide guidance to courts when adjudicating relocation disputes, the court considers various factors to make a determinations. In *LW v DB*[10] the Gauteng High Court dealt with the issue of the best interest of minor children specifically in relocation matters (this matter specifically related to a relocation within South Africa), outlined the following principles distilled from the Constitution, judgments of South African courts, and conventions to which South Africa is a signatory:

- ‘(a) The interests of children are the first and paramount consideration.
- (b) Each case is to be decided on its own particular facts.
- (c) Both parents have a joint primary responsibility for raising the child and, where the parents are separated, the child has the right and the parents the responsibility to ensure that contact is maintained.
- (d) Where a custodial 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 custodial parent is shown to be bona fide and reasonable.

(e) The courts have always been sensitive to the situation of the parent who is to remain behind. The degree of such sensitivity and the role it plays in determining the best interests of children remain a vexed question.’

[68] In ‘For the sake of the children: South African Family Relocation Disputes’[11] the author, Wesahl Domingo (‘Domingo’) observed that South African Courts do not have a uniform approach to relocation disputes.

[69] In certain cases the Court has favoured the pro-relocation approach, accepting in some instances, a presumption in favour of the primary caregiver. Relocating primary care-giving parents are granted leave to relocate with the children to wherever the relocating parent chooses to live, unless it is necessary to restrain a relocation to prevent harm to the children.

[70] An example of such a pro-relocation approach can be found in Jackson v Jackson[12] supra where the Court favoured the pro-relocation approach, providing that the primary caregiver’s decision to move should be shown to be ‘reasonable and bona fide’.

[71] In AC v KC[13], the Court clearly followed the pro-relocation approach. In determining whether the decision by the mother, as primary caregiver, to relocate to Abu Dhabi was reasonable or not, the court relied on the bonus or diligens paterfamilias (reasonable person) test. The view expressed by Domingo,[14] with which I agree, is that this incorrectly allowed the best interests of the mother to usurp the best interests of the child.

[72] In Cunningham v Pretorius[15] Murphy J, applying their neutral approach that places both parents are placed on an equal footing and balances their interests fairly against the child’s best interests, 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.’

[73] In the ‘Washington Declaration on International Family Relocation[16]’, which culminated from a meeting of more than fifty judges and experts in family law from all over the world, it was concluded (in line with the neutral approach) that relocation determinations should be made without any presumptions for or against relocation. The recommendation made was that the exercise of judicial discretion should be guided, but not exclusively, by the following factors:[17]

‘73.1 the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child’s development, except if the contact is contrary to the child’s best interest;

- 73.2 the views of the child having regard to the child's age and maturity;
- 73.3 the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;
- 73.4 where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
- 73.5 any history of family violence or abuse, whether physical or psychological;
- 73.6 the history of the family and particularly the continuity and quality of past and current care and contact arrangements;
- 73.7 pre-existing (care) and (contact) determinations;
- 73.8 the impact of the refusal on the child, in the context of his or her extended family, education and social life, on the parties;
- 73.9 the nature of the inter-personal relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;
- 73.10 the enforceability of contact provisions ordered as a condition of relocation in the State of destination;
- 73.11 issues of mobility for family members; and
- 73.12 any other circumstances deemed to be relevant by the judge.'

[74] In addition to the above guidelines, Domingo *supra* also recommended that when our courts consider different proposals set forth by the parties, they need also to consider:

- '74.1 possible alternatives to the proposed relocation;
- 74.2 whether it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation were to be permitted[18]; and
- 74.3 whether the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child.'

IS THE PROPOSED RELOCATION IN THE CHILDREN'S BEST INTEREST?

[75] Having considered the decided cases and international resources referred to above, I am of the view that as a starting point, a neutral view is preferable in determining whether a relocation order ought to be granted.

- [76] One of the central factors in the present matter is that the parties do not currently have a shared care and residence arrangement, and the respondent's contact with the children is, for the most part, limited to contact during the school holidays. The respondent currently has contact with the children for 50% of the school holidays. In terms of the proposed order, he will have contact with them for two-thirds of the school holidays, which are approximately 14 weeks a year.
- [77] The applicant has been the children's primary caregiver since for the past eight years, since the children were seven years old and three years old respectively. She has contributed significantly to their maintenance and has been there for all their day-to-day needs. There can be no doubt that she is a caring and committed mother.
- [78] The children have a deep and secure attachment with both parents. The respondent by all accounts is a loving and committed father. He has financially maintained the children and has forged a close and caring relationship with them, despite the geographical distance between them. The applicant recognises this and has encouraged this relationship despite the ongoing conflict between the parties.
- [79] The children's views regarding the proposed relocation have been expressed by them to their legal representatives, and independently conveyed to the Court. They have visited Dubai both with the applicant and the respondent and are very eager to relocate there with the applicant and G J. Dubai will provide a modern, cosmopolitan, and privileged environment. They see this as an exciting chapter in their lives, whilst still recognising that it will not be without its challenges.
- [80] The children also clearly have a good relationship with GJ and are accepting of the impending marriage. They have lived together as a family for some time and have a well-established routine and family life.
- [81] In term time the respondent and the children will be able to maintain regular contact through calls, WhatsApp and video chats, as they have done whilst the respondent has been living in Johannesburg.
- [81] It cannot be disputed that the move has been carefully considered and planned by the applicant, and that she will not consider moving without the children. She has taken her time in getting to this point and has weighed up all the relevant considerations, whilst clearly keeping the children at the forefront of her decision making.
- [82] There is no evidence to suggest that the applicant will thwart the respondents right to have contact with the children. To the contrary, she has tendered for him to have significantly increased holiday contact with them and has further offered to bear the cost of two economy return tickets from Dubai to Johannesburg (or the equivalent of the cost of two such economy flights) per child, per school annum to facilitate the children's vacation contact with respondent. Any suggestion by the respondent that the applicant intends thwarting his contact rights are unsupported by the evidence, have been dismissed by the Family

Advocate and are untenable.

[83] Lastly, regarding the enforceability of the order in Dubai of the order below, I am indebted to the applicant's attorney, Mr de Wet, who at the request of the Court provided a detailed memorandum regarding the registration of an order made by this Court in the United Arab Emirates ('UAE').

[84] In terms of the law under the UAE, the enforcement of a foreign judgment is governed by Article 85 of the Cabinet Decision 57 of 2018 on the Regulations of Federal Law 11 of 1992, as amended.

[85] In order for a foreign judgment to be enforced:

85.1 there must be a mutual recognition and enforcement of UAE judgments in the country in which the foreign judgment was issued; and the following conditions must be satisfied:

- (i) the UAE courts must not have had jurisdiction over the underlying dispute (and the foreign court did have jurisdiction according to the laws of that jurisdiction);
- (ii) the judgment must have been issued by a competent court under the law of that country;
- (iii) the defendant must have been summoned and duly represented in the foreign proceedings;
- (iv) the judgment must be final and binding under the law of the country in which the judgment was issued; and
- (v) the judgment must not be inconsistent with a judgment already given by a court in the UAE, nor may it be contrary to UAE principles of morality or public order.

[85] A foreign judgment must be ratified by the UAE Courts before it can be enforced in the UAE. The party seeking to ratify a foreign judgment must first file a petition to the Court of First Instance of the Emirate. The Court is afforded a period of three days to consider the matter in accordance with the conditions listed above and issue an order on the papers. Once the judgment is ratified, it may then be enforced by way of application to the Execution Department of the Courts.

[86] It therefore appears that an order of this Court is capable of ratification by a court in Dubai. Moreover, the applicant's attorney has found an attorney in Dubai who specialise in family law and related matters for the purposes of instructing him to attend to the ratification process.

[87] I am satisfied that this should adequately address the respondent's concerns regarding the enforcement of his rights in Dubai.

[88] Regarding the issue of costs, the applicant seeks an order that the respondent pay the costs of the application on the attorney and client scale. To my mind the respondent's opposition, whilst at times misguided, has not been wholly unreasonable. He has been understandably upset by the applicant's occasionally dismissive attitude towards his views and input as the

children's father. These applications are difficult for all involved and I am not inclined to mulct him for costs, in circumstances where he opposed the relocation of his children to a foreign country.

CONCLUSION

[88] On a conspectus of the evidence and the detailed and most helpful reports of Mr van Embden and the Family Advocate, I am satisfied that the applicant has carefully weighed and balanced the reasonableness of her decision to relocate, that her decision is both bona fide and reasonable, and that the relocation is in the best interests of S and K.

[89] In the circumstances, the following order shall issue:

1. The applicant is authorised to remove the parties' children, S D born on . . 2007 and K D, born on . . 2012 ('the children'), from the Republic of South Africa (RSA) to Dubai, United Arab Emirates (UAE), for the purposes of taking up residence there permanently, by 11 December 2023;
2. The respondent is directed to sign all such documentation as may be required to facilitate the children traveling to and residing permanently in the UAE with the applicant, within three days of her requesting him, in writing, to do so;
3. Should the respondent fail to sign any documents upon request, as provided for in paragraph 2 above, then the Registrar of this Court is authorised to sign such documents in the respondent's stead, upon presentation by the applicant of an affidavit demonstrating her compliance with paragraph 2 above;
4. The parties shall remain co-holders of parental responsibilities and rights in respect of the children as contemplated in the Children's Act 38 of 2005 (South Africa) subject to the provisions of this Order, which rights and responsibilities shall be exercised until each child respectively attains the age of eighteen years, being the age of majority;
5. The parties shall remain co-guardians of the children as provided for in inter alia sections 18(2)(c), 18(3), (4) and (5) of the Children's Act:

5.1 Upon relocation to the UAE, the applicant shall not remove the children permanently to another country without the respondent's written consent. Applicant may remove the children from the UAE or permit them to be removed from the UAE for vacation purposes or on such other reasonable temporary purpose without obtaining the respondent's consent. In respect of any such travel, she shall provide the respondent with reasonable and timeous notice of the children's intended travel as provided for below;

5.2 Upon relocation to the UAE the parties will cooperate with each other in respect of the renewal of the children's passports and obtaining any visas and/ or travel documentation required to enable the children to travel with either party, or, for example on school tours;

6. The parties shall remain co-holders of rights of care and rights of contact in respect of the children:

6.1 It is recorded that the children will attend DAS in Dubai from January 2024. Any decision to move either child to a different school shall be made jointly by the parties, taking into account the views and wishes of the child concerned;

6.2 The parties shall make decisions regarding the following matters in consultation with each other:

6.2.1 the children's medical care, including any elective medical treatment that may be required by them, but which shall not include their day-to-day medical care or emergency medical treatment, taking into account the advice provided to them by the professionals/ experts concerned;

6.2.2 change of religious affiliation by either of the children, and decisions relating to any cultural, spiritual and religious practices to be undertaken by the children, taking into account the views and wishes of the child concerned;

6.2.3 any decision that is likely to have a significant impact on the children's well-being or which is likely to have an adverse effect on their overall well-being and best interests;

6.2.4 decisions affecting contact between the children and either of the parties;

6.2.5 In respect of day-to-day decisions regarding the children, the party in whose care the children are at the time will make such decisions;

6.3 The children shall continue to reside primarily with the applicant;

6.4 It is recorded that the DAS academic year, commenced at end-August in one year and ends in June of the following year. The total vacation time is approximately 14 weeks, with the majority of vacation time taking place in July and August of each year. The children shall be entitled to have contact with respondent for two-thirds of the total vacation time in any school year on the following basis:

6.4.1 The parties shall reach agreement at the beginning of each school year regarding the vacation time that the children will spend with each party in such school year. The parties recognise that it may be necessary to change vacation plans by arrangement to accommodate the children's interests (i.e., factors such as special events in respect of their scholastic/ extra-mural/ social lives). These factors will, in all cases be considered, together with the children's views and wishes, against respondent's right to have contact with the children and their right to have contact with him;

6.4.2 Any vacation schedule shall take into account that the children shall spend each alternate Christmas vacation with each parent, unless agreed to the contrary. The children shall be with the applicant for Christmas in 2023;

6.4.3 In the event that the parties are unable to reach agreement in respect of the children's vacation contact with respondent, as provided for above, then, in one year respondent shall have contact with the children for the spring break (in March/ April) and during the latter portion of the summer vacation, such that the total number of weeks of vacation is calculated as being two-thirds of the total vacation time in the school year; and in the alternate year, the respondent shall have contact with the children for the Christmas break and during the first portion of the summer vacation, such that the total number of weeks of vacation is calculated as being two-thirds of the total vacation time in the school year;

6.4.4 The children's vacation time with the respondent may take place in the RSA, Dubai or such other country as may be agreed by the parties;

6.4.5 The applicant shall bear the cost of two economy return tickets from Dubai to Johannesburg (or the equivalent of the cost of two such economy flights) per child, per school annum to facilitate the children's vacation contact with respondent, provided that respondent confirms the dates and destination of the vacation in question, in writing, not less than four weeks prior to such vacation;

6.4.6 In the event that the children or one of the children requests to be accompanied by an adult on a flight between SA and the UAE, the parties shall share the cost of the flight of such accompanying adult in equal shares, if it is a third party. In the event that the accompanying adult is one of the parties or their spouse/ partner then that party shall bear the cost of the flight of such accompanying adult;

6.4.7 Should the children travel outside the RSA or the UAE with either party (or whilst in the care of either party) at any time, the party concerned shall provide the other party with flight details, the itinerary (including where the children will be staying) and contact details for the children during such period, at least a month prior to such vacation;

6.4.8 In addition to the contact provided for above, should applicant be in the RSA with one or both of the children outside of respondent's scheduled contact time, arrangements shall be made for the child(ren) to have contact with respondent during such period, taking into account the reason why the child(ren) are in the RSA with applicant;

6.4.9 Similarly, should respondent be in Dubai outside of his scheduled contact time, arrangements shall be made for the children to have contact with him during such period, taking into account their school commitments (if it is during term time) or vacation arrangements (if it is during school vacations). The costs associated with any such contact shall be borne by respondent;

6.4.10 The children are entitled to have unlimited telephonic/ face-time/ e-mail and other electronic with the parties at all reasonable times. The parent in whose care the children are at any time shall ensure that the children have the necessary hardware and software to enable such contact to take place;

6.4.11 Similarly, the parties are entitled to have telephonic/ face-time/ e-mail and other electronic with the children at all reasonable times;

6.4.12 In the event that respondent relocates to the UAE or elects to reside in the UAE for any period of time, the children shall have reasonable contact with respondent, to include contact over certain weekends, as may be agreed between the parties at the time, taking into account the children's views and wishes in this regard;

6.5 The applicant shall inform the children's school that she and respondent are co-holders of parental rights and responsibilities in respect of the children, and that in this regard:

6.5.1 Both parties have the right to obtain information regarding the children's educational progress (including reports), as well as in respect of school functions, school-related events, and extra-mural activities;

6.5.2 Both parents are entitled to be placed on any school mailing lists to ensure that they receive communications from the school. The applicant will provide the school with the respondent's email address and mobile phone number;

6.5.3 Both parents are entitled to discuss issues relating to the children directly with any teacher/ educator at the school;

6.6 Where information regarding the children's education (and any related matter) is provided directly to the applicant, and it is apparent to her that it has not been provided to the respondent, she will provide such information to respondent;

6.7 The parties shall advise each other immediately should either child become ill or suffer any injury whilst in their care and shall keep the other party updated in respect of the medical treatment administered to the child and in respect of the child's recovery;

6.8 Both parents shall be entitled to communicate directly with the children's medical practitioners (including any mental health practitioners) about their health, therapeutic and medical treatment, as the case may be. Such practitioners shall be authorised to release such information to both parents and to report directly to both parents regarding the children, subject to any professional ethical duty of confidentiality they may have in respect of the child concerned.

7. Within three (3) months of relocating to Dubai, the applicant is to file a petition to the Court of First Instance of the Emirate In terms of the law under the UAE, for the enforcement of this order as a foreign judgment in terms of Article 85 of the Cabinet Decision 57 of 2018 on the Regulations of Federal Law 11 of 1992, as amended, for ratification and enforcement in the UAE. The applicant is to provide the respondent with confirmation of the abovementioned petition and ratification in due course.

8. Paragraphs 6.1 to 6.8 of this Order shall substitute paragraphs 1 to 7 of the Parenting Plan entered into between the parties at the time of the divorce action, as well as paragraphs 2, 3 and 4 of the Final Order of Divorce order granted by the High Court, Kwazulu-Natal Local Division, Durban on .. 2016 under case number ...
9. The terms and provisions of the Consent and Maintenance Order granted on 31 May 2018 in the Verulam Magistrate's Court, in respect of the payment of maintenance for the children, shall remain of force and effect.
10. Each party shall pay their own costs.

HOLDERNESS, AJ

APPEARANCES

For the Applicant:

Adv. J Mc Curdie SC

Instructed by:

Warrick De Wet Redman

(Mr Warrick De Wet)

For the Respondent:

In person

Mr S[...] D[...] D[...]

For the Children:

Adv. S Van Embden

Norman, Wink and Stephens

(Ms Elana Harrington)

[1] FB v MB 2012

(2) SA 494 (SG) at para [13]

[2] Soller N.O. v G and Another 2003

(5) SA 430 (W) at para [27]

[3] F v F 2006 (3) SA 42 (SCA), and the authorities there cited.

[4] 2002

(2) SA 303 (SCA) at [2]

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- [5] 1969
- (3) SA 529 (D) at 532 E - F.
- [6] At para [11]
- [7] Ibid at [12], and citing 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) in paras [37] - [38] (per Goldstone J), paras [80] and [83] (per Kriegler J), para [93] (per Mokgoro J) and paras [109] - [110] and [113] (per O'Regan J).
- [8] [www.newLawjournal.co.uk](http://www.newlawjournal.co.uk), Sarah Hughes & Victoria Rylatt - Child relocation: the post-COVID landscape
- [9] 1968
- (4) SA 657 (A) at p.669
- [10] 2020
- (1) SA 169 (GJ) at [20]
- [11] Wesahl Domingo, PER / PELJ 2011(14)2
- [12] Jackson v Jackson supra at [2]
- [13] AC v KC A389/08 2008 ZAGPHC 369 16 June 2008 (unreported to date)
- [14] Domingo supra at para 4.1
- [15] Cunningham v Pretorius 31187/08 2008 ZAGPHC 258 21 August 2008 at para [9] (unreported to date)
- [16] This took place at the Hague Conference on Private International Law, hosted by the International Centre for Missing and Exploited Children, with the support of the United States Department of State (hereafter the Hague Conference on Private International Law).
- [16] This took place at the Hague Conference on Private International Law, hosted by the International Centre for Missing and Exploited Children, with the support of the United States Department of State (hereafter the Hague Conference on Private International Law).
- [17] These factors are not listed in order of priority, and the weight to be given to each factor will vary from case to case
- [18] For example, in MK v RK Case (MK v RK 17189/08 South Gauteng High Court (Johannesburg) 6 May 2009 (unreported to date) the non-relocating parent (father) was willing to relocate if the relocation was within South Africa.
- [19] Foley 2006 <http://www.family-justice-council.org.uk>.

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