FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN

JUDGMENT

ECJ:

PARTIES**:** **ROSEMARY ASSUNTA CAMPHER**

And

RICHARD DAVID CUSHING

- Registrar: **CA 113/09**
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD: **05/06/09**

DATE DELIVERED: **09/06/09**

JUDGE(S): **JONES J, JANSEN J, SANDI J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Appellant(s): **Mr.: B. Dyke**
- for the Respondent(s): **ADV: G. Goosen**

Instructing attorneys:

- for the Appellant(s): **NETTLETONS ATTORNEYS**
- for the Respondent(s): **NEVILLE BORMAN AND BOTHA**

CASE INFORMATION -

1. *Nature of proceedings*: **APPEAL**

Not reportable

THE HIGH COURT OF SOUTH AFRICA

In the Eastern Cape High Court
Grahamstown Case No. CA 113/2009

In the matter between

ROSEMARY ASSUNTA CAMPHER **Appellant**

and

RICHARD DAVID CUSHING **Respondent**

Summary Child – application in terms of s 18(5) of the Children's Act 38 of 2005 by one parent for an order declaring that the consent of the other parent to take a minor child outside the Republic of South Africa is unnecessary and may be dispensed with, with other related relief – held, on appeal, that the best interests of the child were served by granting this relief.

Coram JONES, JANSEN AND SANDI JJ

JUDGMENT

JONES J

[1] The parties to these proceedings are husband and wife. They are involved in divorce proceedings which were commenced in 2008. They have one minor child, a little boy, who was born on 2 August 2005. He is now 3 years and 10 months old. He is the central figure in the litigation now before us.

[2] The parties initially lived and worked in London. During 2007 the appellant, Mrs Campher, was diagnosed with ovarian cancer. She was treated by a Dr Slevin and his team at the London Oncology Clinic. She underwent major surgery, followed by chemotherapy. This treatment was successful. Mrs Campher made a complete recovery. She and her husband, Mr Cushing, then moved to South Africa. He took up employment in Johannesburg, but the couple decided to make their home at St Francis Bay in the Eastern Cape. This required Mr Cushing to commute. Things did

not work out between them and they became estranged. In the beginning of 2009 they separated. The child remained in his mother's care. Mr Cushing would come to St Francis Bay for three or four nights each week to have access to him.

[3] Mrs Campher remained in remission for a period of some 16 months after the conclusion of her treatment regime. Then there was a recurrence of the cancer. A malignant tumour was detected which has become progressively larger at an alarming exponential rate. There is no dispute that Mrs Campher requires urgent specialized surgery for a resection of the tumour. This must be preceded by chemotherapy to reduce its size. The surgery cannot be done in this country. She will have to go back to the London Oncology Clinic. This might take a few months, but it could take as long as six months. If she does not have the treatment, her prognosis is bleak. Her South African oncologist, Dr Maart, who was the only witness to give *viva voce* evidence at the hearing of this application, considers that without treatment she will not have more than about six months to live.

[4] Mrs Campher intends to take the child with her to London. For this, sections 18(3)(c)(iii) and 18(5) of the Children's Act No 38 of 2005 require the consent of his parents. Mr Cushing is of the view that it will not be in the child's best interests to be with his mother while she is undergoing treatment. He has refused to give consent and suggested that he should look after the child while his mother is in London. Hence these proceedings. Mrs Campher brought an urgent application in terms of section 18(5) which provides that unless the court orders otherwise, the consent of all the persons who have guardianship of a child is necessary in respect of matters set out in subsection 18(3)(c), which includes the removal or departure of a child from the country or an application for a passport. The chief relief in her notice of

motion was an order declaring that the consent of Mr Cushing is not necessary and is dispensed with for the purpose of the child's impending departure from South Africa, and also for the purpose of getting passport of emergency travel documents for him. Mr Cushing opposed the application.

[5] The notice of motion set the application down for hearing on 15 April 2009. The papers canvassed a number of issues and the matter was fully argued. The only witness to give *viva voce* evidence was Dr Maart. The learned judge came to the conclusion that she was 'not satisfied that a proper case has been made out that it would be in the interests of the minor child to travel to London with the applicant'. She dismissed the application by order dated 21 April 2009 and ordered that the parties pay their own costs. Mrs Campher now appeals against that order, with the leave of the court *a quo.*

[6] The application was brought and dealt with as a matter of extreme urgency. The learned judge had the unenviable task of having to worry through a considerable number of difficult issues and side issues before reaching her conclusion, which she did with commendable expedition. The issue was of great importance to the well-being of the minor child, and was complicated by emotive factors such as the nature and degree of Mrs Campher's ill-health, the effect of proposed treatment on her and the child, and the relationship of the child and each of his parents. The same complications were present in the presentation of the appeal, which was also arranged and dealt with as a matter of extreme urgency. After hearing the careful and penetrative evaluation of the court *a quo*'s reasons for her judgment in counsels' arguments, we came to the conclusion that the judgment of the court below was wrong, that the appeal should be allowed, and that the order should be altered to an

order which will enable Mrs Campher to go to London with her child as soon as possible and which was designed to allay Mr Cushing's misgivings about the child's well-being while he is out of the country. Because of the urgency, we made an order to that effect immediately, and stated that we would give reasons later. These are the reasons. We consider, once again because of the urgency, that the parties should be given the reasons as soon as possible. This means that the reasons must necessarily be brief and that we do not deal with all the issues and arguments which were debated before us. Instead we have concentrated almost entirely on why a departure from the trial judge's findings is justified. It is probably just as well that we have decided not to comment upon or even refer to some of the issues which occupied much space in the papers and quite a lot of time in counsels' heads and in their arguments before us. A major point of dispute in the divorce is going to be the suitability of the parties to be the primary care giver of the child. The facts and the different points of view of the parties and their witnesses on this issue were dealt with before us and they will also take up a large portion of the court's attention at the trial. The least said in this judgment about matters which must still finally be pronounced upon, the better.

[7] The propriety of a departure on appeal from conclusions based upon findings of fact is not a complication in a matter such as this. No credibility issues arise from the hearing of the evidence of Dr Maart. For the rest, everything else is on paper. We are in as good a position as the court *a quo* to come to a proper conclusion if we consider that her judgment is incorrect.

[8] There are two major reasons for our conclusion that her judgment cannot be supported. The first is her approach. Here, the adversarial positions taken up by Mrs

Campher and Mr Cushing on a number of important points has clouded the issues and misled the learned judge. This has resulted in a determination of what is in the best interests of the child with reference to whether Mrs Campher had discharged an onus. The court's finding was that the applicant (now the appellant) had not been able to satisfy the court that she had made out a case that it was in the child's best interests to take him with her to London. Furthermore the learned judge's findings in respect of facts which she considered were in dispute were reached after a rigid application of the rule in *Plascon-Evans Paints Ltd* v *Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) which requires, *inter alia,* an acceptance of the respondent's version of facts, together with the applicant's facts which were admitted or indisputable. This was not a proper approach. The proper approach is clearly set out by Howie JA *in B* v *S* 1995 (3) SA 571 (A) 584 I – 585 E:

> In addition it seems to me to be necessary to lay down that where a parental couple's access (or custody) entitlement is being judicially determined for the first time - in other words where there is no existing Court order in place - there is no onus in the sense of an evidentiary burden, or so-called risk of non-persuasion, on either party. This litigation is not of the ordinary civil kind. It is not adversarial. Even where variation of an existing custody or access order is sought, and where it may well be appropriate to cast an onus on an applicant, the litigation really involves a judicial investigation and the Court can call evidence *mero motu*: *Shawzin* v *Laufer* 1968 (4) SA 657 (A) at 662G-663B. *A fortiori* that is so in the 'first time' situation. And it matters not in this regard whether the child concerned is legitimate or illegitimate.
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> Strong support for the view that no onus lies is to be found in the above-quoted passage in *A* v *C*[1] (*supra* at 456A-B) and its subsequent endorsement by the House of Lords in *Re KD*[2] (*supra*).
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> Moreover, if the dispute were properly ventilated by way of as thorough an investigation as may reasonably be possible, it is, to apply the point made in *Re KD* at 590c, difficult to envisage when the welfare of the child will not indicate one way or

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1 *A* v *C* [1985] FLR 445 (CA)

2 *Re KD* (*a minor*) (*ward: termination of access*) [1988] 1 All ER 577 (HL) at 589c-f.

> the other whether there should be access. That presupposes, of course, that all the available evidence, fully investigated, is finally in. It follows that if a Court were unable to decide the issue of best interests on the papers, it would not let the matter rest there. While there might often be valid reasons (for example, expense or the nature of the disputed evidence) for not involving expert witnesses, at the least the Court would require, and if necessary call, oral evidence from the parties themselves in order to form its own impression (almost always a vital one) of their worth and commitment. Because the welfare of a minor is at stake, a Court should be very slow to determine the facts by way of the usual opposed motion approach in *Plascon-Evans Paints Ltd* v *Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). That approach is not appropriate if it leaves serious disputed issues of fact relevant to the child's welfare unresolved.[3]

[9] The misdirection in the way in which the application was approached justifies a reconsideration of the issues by a court of appeal. There is, further, another difficulty with the way in which the learned judge approached the matter. The highly emotive question of Mrs Campher's illness and the possible debilitating effect on her of the treatment to which she would be exposed caused a shift in focus away from the most important point in the case – the physical, psychological and emotional well-being of this particular child in these particular circumstances. One of the prime reasons underlying the judgment is the child's exposure to his mother's treatment in London coupled with the uncertainty attendant upon not only her treatment, but also her reaction to it. This was fundamental to Mr Cushing's opposition,[4] the cornerstone of Mr *Goosen*'s argument on his behalf, and at the heart of the judgment. It was

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[3] This is not to say that the *Plascon Evans Paints* rule is not to be applied at all in matters involving children. If it is to be applied, it must be applied with circumspection and, if necessary, modified so that the court will not decide issues involving children on facts which are determined on an artificial basis and which may not be the real facts. If there is a risk of that, the trial judge is under a duty to call evidence to resolve the dispute. I do not understand the judgment in *Pennelo* v *Pennelo* 2004 (3) SA 117 (SCA) 138 – 140 to depart from the wisdom of *B* v *S*, to which it makes no reference. In any event, *Pennelo*'s case applies to the issues in the case before it.

[4] His founding affidavit says: I cannot, however, stand back and allow our three year old child to experience the confusion and trauma of becoming an adjunct to his mother's aggressive cancer treatment, being her close and constant companion throughout her forthcoming chemotherapy and surgery in the advanced stages of her illness, in a foreign country and without even the presence or comfort of his father.

indeed important. But it required evaluation in the light of the child's age, his mental and emotional status, and the extent of any damage caused to him by separation from his mother.

[10] The judgment acknowledged that Mrs Campher's case was based on her concern that the child would be traumatized by the sudden and drastic change in his life caused by separation from his mother and being placed in the temporary custody of his father. The judgment correctly accepted that the child's life would inevitably be disrupted, whether he lives with his father or his mother during the next few months. But there was no analysis at all of the evidence in support of Mrs Campher's contention that the child would be harmed if he were to be taken away from his mother at this time. In consequence of that, and even more importantly, there was no evaluation of the nature and extent of that harm. I believe that the failure of the trial court to give full and detailed consideration to this is a fundamental flaw which vitiates her reasoning.

[11] In considering what is in the best interest of a child, section 7 of the Children's Act enjoins the courts to have regard, *inter alia,* to the nature of the personal relationship between the child and his parents; the capacity of the parents to provide for the needs of the child, including emotional and intellectual needs; the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from his parents; the child's age, maturity and stage of development, gender and background; and the child's physical and emotional security and his or her intellectual, emotional, social and cultural development. These considerations are canvassed in the evidence of Mrs Campher. Some of them are dealt with in detail in the evidence of the psychologist Ms Lyn Foster, and the

social worker Ms Mandy Daniels, who was able to give direct evidence of her observations of the child and Mr Cushing together. The judgment does not evaluate the content of the evidence of Ms Foster and Ms Daniels and the reasons they give for their views on matters which, according to the legislation, are of vital importance. The upshot is that the judgment *a quo* in effect either ignores or gives too little weight to common cause and unchallenged evidence

- that the child is a little boy not yet four years old who has an extremely close and dependent relationship with his mother;

- that he has never separated from her before except when she has been in hospital;

- that she has been the primary care giver and the parent primarily responsible for all his physical, intellectual and emotional needs;

- that he is confused and emotionally disturbed by the separation of his parents;

- that he displays a high level of anxiety and insecurity when away from his mother for more than about 20 minutes;

- that he knows that his mother is ill and that she must travel to London, and he is afraid that he will be left behind;

- that his emotional well-being is dependent upon being close to his mother, especially as he knows that she is unwell;

- that he has suffered great upheaval in his life, which has created confusion, uncertainty, fear, and a distrustfulness of adults to be able to take care of him;

- that to remove him from his mother and deny him contact with her for any length of time in these circumstances and at this time of his life would, in the opinion of the clinical psychologist, be a form of emotional abuse given his high levels of anxiety;

- that one of the effects of the separation of his parents is that he has a poor relationship with his father, and shows extreme reluctance and fits of panic when his father exercises his rights of access. This has in recent months been in the absence of his mother but under the supervision of a social worker;

- that he displays anger towards his father, which his father has difficulty in understanding or dealing with;

- that in the opinion of the social worker to place the child in his father's presence for any period of time at this difficult time in the child's life is most likely to be construed by the child as a punishment; and that any form of forced separation from his mother can only be experienced by him as abandonment, and will have far-reaching repercussions for him, affecting him well into his adult life.

These are compelling reasons for allowing Mrs Campher to take the child with her. In the light thereof, there must at least be equally compelling reasons before she is prevented from doing so.

[12] The reasons given in the judgment are far from compelling. The evidence of Ms Foster and Ms Daniels is glossed over and disregarded as if of no importance for reasons that to my mind are unconvincing and unsubstantiated by the facts. That Mr Cushing was not interviewed by Ms Foster cannot logically have bearing on her

opinions about the emotional status of the child, which was the sole point of her involvement. It is fallacious to infer that Ms Foster or Ms Daniels were unaware that Mrs Campher would be travelling abroad with the child at a time when Mrs Campher might be emotionally distressed. No reason is given for doubting the correctness of the factual observations of these witnesses or the validity of their opinions. No explanation is apparent for the failure to give an in-depth assessment of such expressions as 'emotional abuse' or 'abandonment (in eyes of the child)' by separating this child from his mother, and no reasons are given why the court did not accept the recommendations of these witnesses.

[13] The real reason for dismissing the application does not consider or deal with the evidence of the effect of separation from his mother on the well-being of the child. In the eyes of the court *a quo*, the 'fundamental difficulty with this application' arose from the 'uncertainty of what will happen to the applicant in London'. This can only mean difficulty with the capacity of Mrs Campher to look after the child in London. The point in the judgment was that this difficulty arises out of (a) uncertainty in Mrs Campher's case as to the treatment to be given, (b) uncertainty as to the duration of the treatment, and (c) uncertainty as to her reaction to chemotherapy.

[14] The duration of the treatment was not open-ended, as the judgment suggests, although that might have been the effect of an order in terms of the notice of motion as originally framed. The draft order sought by Mrs Campher's counsel at the conclusion of the hearing puts a limit of 6 months to the relief. That is not uncertain.

[15] I do not understand the argument based on alleged uncertainty about what will happen to Mrs Campher in London. There is no uncertainty about her diagnosis

of ovarian cancer or that it is to be treated by Dr Slevin at the London Oncology Centre. There is no uncertainty that chemotherapy is necessary to reduce the size of the tumour, and, if it does, that as a matter of probability surgical removal of the tumour will follow. There is of course uncertainty about the precise course of drugs which Dr Slevin may select for chemotherapy. But that cannot give rise to difficulty in granting or refusing the application. There can never be certainty from a medical point of view about whether the chemotherapy will be effective or, if it is, whether the surgery will be successful. No doctor can ever guarantee anything like that. That, also, cannot give rise to difficulty in granting or refusing the application.

[16] Next, there is the question of uncertainty about the effect of chemotherapy on Mrs Campher's ability to look after the child while undergoing it, and the harmful effect on the child of witnessing what is happening to his mother. There are four answers to Mr Cushing's concerns. In my view, the judgment is inappropriately dismissive of them for reasons that cannot be supported.

[17] The first reason arises from the failure of the court *a quo* to attach proper weight to the evidence of Dr Maart that the after-effects of chemotherapy are fatigue, nausea, and risk of infection, but that they do not generally impair a patient's ability to perform as a parent. The reason given for Dr Maart's view was that the drugs commonly administered in cases of ovarian cancer would not render her too unwell to look after a 3 year old child, even as an unsupported parent. The judgment ignores this reason and does not explain why the evidence should not be afforded weight. It seems to me that it should be given considerable weight. Who better to describe the effects of chemotherapy than a practising oncologist who treats patients every day and who must know how his treatment affects them in their daily lives? In

my view, the trial court's finding in this regard was a misdirection on a material issue, an issue that went to the root of the matter.

[18] Second, this is not the first time that Mrs Campher has received chemotherapy for ovarian cancer. She has gone through it all before, last time in a weakened condition while recuperating from massive surgery.[5] Previously, she had her husband with her to help her to look after the child. Her evidence is that she was well enough to care properly for the child although there were times when she suffered from fatigue and needed extra sleep. What happened in the past need not necessarily recur in the future, but in this case it is in my view quite a good indicator. More probably than not, Mrs Campher will be able to manage this time around as well. She is, furthermore, supported in this by the evidence of Dr Maart about the after-effects of drugs used for ovarian cancer. Mr Cushing alleged that she has underplayed the effects of the previous chemotherapy. According to him, her condition was much worse than she claims in these papers. The learned judge found that this created a dispute of fact which could not be resolved in motion proceedings. If the finding was right that this was a real dispute which could not be resolved, and if the resolution of the dispute was important to determining the best interests of the child (it appears to have been so considered by the reasoning in the judgment), it was the court's duty in terms of *B* v *S supra* to resolve the dispute by calling evidence *mero motu.* The trial judge was certainly wrong in allowing it to be used as grounds for finding that Mrs Campher had not satisfied the court about the best interests of the child. In any event, it is my view that this was not a genuine and irresoluble dispute of fact in the *Plascon-Evans Paints* sense. Mrs Campher, who personally went through the experience of chemotherapy, and Dr Maart, whose

[5] This will not now be the case because the chemotherapy is to precede the surgery, although the possibility of post-operative chemotherapy cannot be ruled out.

patients continually go through that experience, are in a position to give reliable evidence on the point. Mr Cushing's evidence to the contrary is no more than a subjective reconstruction of something that was not personally experienced by him but by his wife. In effect it was a second-hand account by a layman of the effects of chemotherapy, and on the face of it unreliable. This is one of those cases where the court is able to find on the papers, and without violation of the rule in *Plascon-Evans Paints,* that an applicant's version of the facts was not the subject of a real and *bona fide* dispute, and was acceptable.

[19] Third, the finding in the judgment assumes that Mrs Campher will be alone in London during the time when the effects of the chemotherapy may be debilitating. The judgment finds, with justification, that reliance on the many persons Mrs Campher mentioned in her affidavit as being willing and able to come to her assistance may not always be possible or satisfactory if things get really difficult. But the judgment ignores entirely the evidence that Mrs Campher is to take a friend, a Ms Tracy Kitching and her 17 year old daughter, to London with her to ensure that there would always be somebody readily available to support her in caring for the child when this was likely to be required, and who would be there during potential emergencies. This evidence places a different complexion on the matter. Furthermore, Mrs Campher's affidavit raised and dealt with the worst kind of scenario – the plight of a small child in London whose mother is virtually alone and becomes so ill that she is quite incapable of looking after him. In that event she foresees that Mr Cushing would come to London as a matter of urgency to take care of the child and, if necessary, to take him back home with him. Mr Cushing raised certain practical difficulties to all of this. But nowhere does he contend that he would be unwilling or unable to come to the child's rescue in London by flying there at short

notice if circumstances should demand it. I have no doubt that he would be able to do so if the interests of his child required it. The conclusion is that the prospect of the child suffering harm because his mother is to undergo chemotherapy is remote – so remote that it can be disregarded. This aspect of the uncertainty argument is also, therefore, unconvincing.

[20] There is no factual foundation for a fear that this child will be harmed if he is present in London and witnesses the effect of chemotherapy on his mother. Children witnessing medical treatment is something which regrettably happens not infrequently to a not insignificant number of families who have to manage a serious illness in the home. It is unfortunate but not unmanageable.

[21] In my view, therefore, there is no uncertainty in the presentation of Mrs Campher's case in the sense that she does not lead available evidence to clarify uncertain facts and deliberately leaves things in the air. She has no onus, but if she did, she does not fail to discharge it on that account. Mr Cushing also does not have an onus. But there is considerable uncertainty in the presentation of his case that the child's best interests will be served if the child comes to live with him. There is uncertainty about his arrangements for looking after the child in Johannesburg. The only information in his affidavit is that a suitable house is available for renting and occupation by him and the child, with a play school nearby. He is a busy business executive. It cannot be supposed that he proposes to keep the child with him at all times. There are no allegations about the arrangements for looking after the child during the day while he is working. This much is clear. The routines which Ms Daniel consider important to his well-being will be disrupted, the persons who are to care for him will be complete strangers, and his mother will not be in the near vicinity to give

him the sense of security he requires. None of this is in his interest. The uncertainties of life in London are addressed in the papers. The uncertainties of life in Johannesburg are not. I should explain that this is not intended as a criticism of Mr Cushing or his papers. I appreciate that he has hardly had the time or opportunity to make arrangements by reason of the urgency of the application. It is no more than a comment upon the emphasis by the court *a quo* on so-called uncertainty in Mrs Campher's case, without similar emphasis on an obvious area of uncertainty in Mr Cushing's case in much the same context. This goes to the validity of her reasons based on uncertainty and her over-emphasis of the uncertainty issue. I accept that, if he has to do so, Mr Cushing will make the best possible arrangements for his child which circumstances permit.

[22] The judgment made the point that the removal from the country will place temporary restrictions on Mr Cushing's rights of access. That is inevitably so. Mr Cushing cannot be expected to travel as often to London as he presently does to St Francis Bay. It is important that the relationship between father and son be rebuilt and cemented. The information presently is that this will take time. A slow down for a period of perhaps as long as 6 months is undesirable. But it is a lesser evil than the harm caused by a complete separation from his mother for that period.

[23] For these reasons we ordered that the appeal be allowed, and that an order issue in the terms set out in the order dated 5 June 2009. That order is not based on any concessions made by Mr Cushing's counsel, but has input from him in order to allay as much as possible some of Mr Cushing's fears about what may befall his child while in London. It also makes provision for him to have regular contact with the child.

[24] Before the commencement of the appeal, Mr *Dyke*, for the appellant, moved an application to admit further evidence on appeal. The evidence was the Family Advocate's report, and reports by psychologists which were attached to it. These had been prepared for the divorce action and have only just become available. The recommendation in these documents were directed at the issue of who is to be the primary care giver after divorce, and the reports have bearing on the psychological make-up of the child and on his relationship with his parents, issues which were also raised before us in the appeal. The application was opposed and argued. We did not make an order at the conclusion of argument, but chose instead to proceed with the appeal because of its urgency. With the acquiescence of counsel we proceeded on the understanding that both counsel may, if they wished, refer to passages in the Family Advocate's report and annexures subject to the proviso that if we ruled that the evidence was inadmissible, we would ignore any such passages. At the end of the day we formed the view that it was possible and proper to decide the appeal without the need to consider any of the references to the new matter. It is therefore not necessary to deal with the application to lead further evidence. We also do not propose making a costs order in respect thereof.

RJW JONES
Judge of the High Court
9 June 2009

JANSEN J I agree.

JCH JANSEN
Judge of the High Court

SANDI J I agree

B SANDI
Judge of the High Court