

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MAKHANDA]**

CASE NO.:914/2023

In the matter between:

D[...] J[...] H[...]

APPLICANT

and

A[...] H[...]

RESPONDENT

JUDGMENT

NORMAN J:

- [1] The applicant moved Court on an urgent basis seeking, amongst others, an order interdicting and restraining the respondent from permanently relocating with their minor child (SH) who is ten (10) years old from Graaf Reinet to Sommerset West on 31 March 2023, pending the determination of the relief in Part B and pending also the finalization of an investigation by the offices of the Family Advocate and their recommendations in respect of the best interests of the minor child. In Part B of the Notice of Motion the applicant seeks, in the main, an order that he be granted primary care of the minor child subject to the respondent's reasonable rights of contact in terms of section 18(2)(b) of the Children's Act No. 38 of 2005 ("the Act"). In the alternative, he seeks an order interdicting the respondent from relocating with the minor child to Somerset West.
- [2] He also seeks an order that the Court must direct the Family Advocate to enquire into amongst others, whether it is in the best interests of the minor

child that primary care and primary residence remain with the respondent and whether the respondent should be appointed as a primary caregiver.

- [3] The respondent filed a counter- application wherein she sought in Part A, an order directing the Family Advocate to investigate and report on the best interests of the minor child relating to relocation to Somerset West. In Part B, she seeks an order that she is authorized to remove the minor child from Graaf- Reinet to permanently reside with the respondent in Somerset West; that she would be the primary caregiver and the child will reside with her in Somerset West. She also seeks an order relating to the applicant's access and visitation schedule.
- [4] I do not deem it necessary to delve into all the facts leading up to the launching of the urgent application because prior to the hearing, the parties, by agreement, presented to court two draft orders "A" and "B". In the draft orders the parties reached agreement on most of the issues including the main relief in Part A that an interdict should issue interdicting the respondent from relocating with the minor child pending, *inter alia*, the finalization of Part B and the conclusion of investigations by the Family Advocate on whether or not the relocation would be in the child's best interests.
- [5] The only issue for determination is whether the Family Advocate in conducting investigations should look into the issue which appears at paragraph 1.3.3 of the draft order marked "B" which reads as follows:

'1.3.3 Whether it is in the best interest of the minor child that primary care and primary residence remain with the respondent or whether the applicant should be appointed as primary caregiver with primary residence.'

- [6] The respondent is opposed to the enquiry proposed in paragraph 1.3.3, above. She avers that the issue of primary care and primary residence was agreed to between the parties and need not be revisited.

Relevant facts

- [7] The parties are currently involved in divorce proceedings. They both work for the R[...] Family. The applicant is a yearling manager and resides on his employer's farm, R[...], in Graaff Reinet. The respondent is employed as a private chef and hospitality/housekeeping manager. She and the minor child moved from the farm during August 2021 to reside in a small flat in the industrial area of Graaff Reinet.
- [8] The applicant complained that, without being afforded adequate notice, his wife, advised him that on the 31 March 2023 she would be relocating permanently from Graaff Reinet to Somerset West with the minor child.
- [9] The reason advanced for the relocation by the respondent is that during February 2023, her employer offered her an opportunity to relocate to Somerset West and work for her at the Parel Vallei Estate. She contends that the package offered, should she relocate, is substantially more beneficial to the minor child and herself. It would include a substantial housing allowance for their accommodation. She regards this as a once in a lifetime opportunity because such an opportunity is unlikely to be repeated in Graaff- Reinet because employment opportunities and promotion chances are limited. She contends that the relocation will benefit her personally as she would be receiving a beneficial income package, better living conditions and an advancement in her career. She also listed arrangements and suggestions in relation to the applicant's access that would apply if they relocate, which arrangements are, according to her, in the best interests of the minor child. It is not necessary for me to deal with those arrangements herein because the parties are in agreement that an investigation must be conducted by the Family Advocate into, *inter alia*, whether the relocation would be in the best interests of the minor child.
- [10] The office of the Family Advocate has been involved in the divorce proceedings and has compiled two reports. In both reports they recommended that the minor child shall primarily reside with the respondent and that she would be the primary caregiver. The respondent stated that

should it be found by the Family Advocate that it will not be in the interests of the minor child to relocate, she will not relocate.

Mr Tarr appeared for the Applicant and Mr Brown for the respondent.

Applicant's submissions

[11] Mr Tarr submitted that: In the light of the contemplated relocation by the respondent, the Family Advocate should also revisit the child's primary residence. He submitted that the agreement between the parties that the respondent be the primary caregiver was influenced by, *inter alia*, the fact that she was resident in Graaf Reinet. He submitted that the respondent cannot dictate to the Family Advocate in relation to the scope of the investigation. He submitted further that the fact that both parties have been regarded as the minor child's caregivers by the Family Advocate should be sufficient to obviate the need for the respondent to relocate with the minor child.

[12] He contended that there can be no prejudice if the issue of primary residence of the minor child is reconsidered by the Family Advocate. Relying on *Soller NO & Another v G & Another*¹, he submitted that the order sought by the applicant falls under section 4 (1)(b) of the Mediation in Certain Divorce Matters Act 24 of 1987 ("the MICDM Act").

[13] He submitted that it is in the interests of the minor child that the issue of primary residence be re-considered by the Family Advocate. In argument, he referred to *B v B*² for the submission that the investigation is important as it was found in that case.

Respondent's submissions

[14] Mr Brown, on the other hand, submitted that the issue of a primary caregiver was agreed to by the parties and there is no reason for it to be re-visited. In

¹ 2003 (5) SA 430 W.

² CA&R 2017 [2018] ZAECHGHC 74.

this regard he relied on *Angela Roberts v Brandon Scott Kearney*³ by Chesiwe J, where the Family Advocate was mandated to investigate the minor child's best interests, specifically with reference to the minor child's relocation. He submitted that there are no valid reasons that would necessitate an investigation into the issue of the child's primary caregiver.

Discussion

[15] Section 28 (2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. Section 7 of the Act deals with the best interests of a child standard. That section lists the matters that must be taken into consideration whenever the best interests of the child standard is to be applied. Section 9 of the Act is consistent with the provisions of section 28 (2) of the Constitution that it provides that in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied. This is the well-known '*paramountcy principle*' referred to by the Constitutional Court.⁴

[16] The applicant, for its submissions, relied on the powers and duties of the Family Advocate are set out in the relevant part of section 4 of the MICDM Act as follows:

'4.1 The Family Advocate shall –

(a) After the institution of a divorce action; or

(b) After an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of or access to, a child made in terms of Divorce Act 1979 (Act No. 70 of 1979) if so

³ Case No. 3451/2021 Heard 2 December 2021 Delivered 18 March 2022 Free State Division, Bloemfontein.

⁴ *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007) para 27.

requested by any party to such proceedings_or the Court concerned, institute an inquiry to enable him to furnish the Court at the trial of such action or at the hearing of such application with a report and recommendation on any matter concerning the welfare of each minor or dependent child of the marriage concerned regarding such matter as it is referred to him by the Court.'

[17] The above mentioned provisions do not support the applicant's contention that issues that have been agreed to or already investigated should be revisited without any valid grounds for so doing. I have had regard to the authorities relied upon by both parties. In my view, those decisions are not relevant for the purposes of determining whether or not the question of a primary caregiver should be revisited. Those cases deal purely with the issue of relocation and that issue as already indicated, the parties have agreed that there will be no relocation pending the recommendations of the Family Advocate. What is apparent from those authorities though is that when the courts dealt with the issue of relocation they did not enquire into the issue of a primary caregiver that had been agreed to by the parties. The courts relied on the parenting plan records.⁵

[18] The starting point, in my view, is to enquire how the issue of primary residence of the child was determined that the applicant should be the primary caregiver. The Regional Court Magistrate sitting in Graaf Reinet, in the proceedings held in terms of rule 58 of the Magistrate's Court Rules which were launched by the respondent, the mother, recorded, *inter alia*, "The Applicant and the minor child moved out of the matrimonial home in August 2021 and are currently residing with friends. The minor child's primary place of residence and contact with the minor child at this stage of the proceedings, are not in dispute. The points of dispute between the parties that fall to be

⁵ See: ADB v BAK (15944/22P) [2023] ZAKZPHC 1 (9 January 2023) at para 1 "*The parenting plan records that the minor child shall have her primary place of residence with the applicant, subject to the respondent's rights of contact with her, and that the applicant shall be her primary care-giver.*"

decided by this court are maintenance pendente lite and a contribution towards the Applicant's legal costs."

[19] At the end of the rule 58 proceedings and as agreed between the parties, the Regional Court Magistrate made the following order, amongst others:

'(f) The minor child's primary place of residence shall be with the Applicant. The Applicant shall be the minor child's primary caregiver, with the Respondent to have reasonable rights of access as follows:

1) The minor child to go to the Respondent every Wednesday afternoon and must be returned to school the following morning;

2) The minor child to be in the care of the Respondent every second weekend commencing on Friday after school until the Monday morning.

3) Contact on Respondent's birthday, Fathers' Day and the minor child's birthday.

4) Reasonable telephonic and video call contact and

5) School holidays to be divided between the parties and Christmas to alternate between the parties.

(g) The Office of the Family Advocate is requested to conduct an investigation in relation to the question of primary residence and contact in respect of the minor child and to render a report.'

(my emphasis).

[20] In the Family Advocate's reports dated 11 January 2023, at page 70 paragraph 6.1.1 and 6.1.2 the Family Advocate made the following recommendations:

‘6.1.1 The parties remain co-holders with full parental responsibilities and rights in respect of the child, as defined in section 18 of the Act.

6.1.2 *SH shall primarily reside with the Plaintiff.*

6.1.3 SH shall have reasonable contact with the Defendant, which shall be structured but not limited to the following: ...”

A comprehensive structured plan was set out.

[21] In a report that was compiled by the Family Counsellor, Mrs Sorita Niemen, after conducting investigations, she recommended that SH will primarily reside with the mother and will have contact with the father according to the structured plan set out in the recommendation.

[22] Between January 2023 after these reports were filed, and prior to the relocation issue, there were no complaints whatsoever in relation to the respondent as a primary caregiver. There were no complaints that she was frustrating the applicant’s access and visitation rights. The only reason that it is being raised is because of the relocation.

[23] Counsel for the applicant submits that it was agreed at the time that the respondent would be the primary caregiver because she was residing in Graaf Reinet. But now that she intends to relocate that issue needs to be reconsidered.

[24] I disagree with the submission that the issue of the respondent as a primary caregiver automatically becomes open for reconsideration as soon as relocation is contemplated. I say so for these reasons:

- (i) the Regional Court Magistrate assigned the respondent as the primary caregiver and that order still stands, it has not been challenged.

- (ii) there are two reports by the Family Advocate and a Family Counsellor compiled in January 2023 that are consistent with the order of the Regional Court Magistrate that the primary caregiver for the child would be the mother.
- (iii) the applicant himself agreed that the respondent should be the primary caregiver and that agreement was found by Mrs Niemand to be in the child's best interests.
- (iv) A period of at least nineteen (19) months has lapsed since the respondent and the minor child left the common home and have been staying together, with the applicant exercising parental rights in accordance with the structured plan.
- (v) The Office of the Family Advocate conducted an investigation into the minor child's best interests pertaining to her primary residence and contact from March 2022 until June 2022. A second investigation into allegations made by the respondent, *inter alia*, that the applicant addressed the minor child in abusive terms, commenced on 27 September 2022 until 19 December 2022.
- (vi) Looking at the investigations, referred to, above, they lasted for a period of approximately six months.
- (vii) The child has been used to the routine that has been officially put in place with the help of the Family Advocate and agreement between the parties since January 2023 to date. Once a parent has been given a responsibility as a primary caregiver, such responsibility cannot be taken lightly and he / she may not be divested thereof without good reason.
- (viii) To direct a fresh investigation which will entail another assessment for the minor child, two months after the agreement on the primary

caregiver issue, is certainly undesirable and not in the child's best interests.

[25] The Act defines "care" as follows:

'Care – in relation to a child includes, where appropriate –

(a) within available means, providing the child with-

(i) a suitable place to live;

(ii) living conditions that are conducive to the child's health, well-being and development; and

(iii) the necessary financial support;

(iv)"

[26] The respondent must be afforded adequate time to exercise her rights as a primary care giver and in consultation with the applicant without having the threat of having her stripped of that responsibility or right whenever there is a dispute between the parties. That decision was taken in January 2023. The minor child needs stability around her life.

[27] Courts rely on the counsel of Family Advocates in family matters because they possess the necessary skills and expertise to recognize what is best for the minor child. They made those recommendations two months ago. I have no doubt that they made them having taken into account everything that was said by the couple and the child and their investigations and observations from those sessions. Those recommendations, after they have been accepted by the Regional Court and by the parties, cannot be impugned without valid reasons.

- [28] The issue of relocation must not be conflated with the issue of a primary caregiver. I have no doubt that the applicant himself would not have agreed that the respondent should be the primary caregiver if she was not suitable to be one. The parties are in a better position because they each enjoy good relations with the child.
- [29] The respondent indicated in her counter- application that if it is found that relocation is not in SH's best interests she will forego the opportunity presented to her by her employer in Somerset West. It is common cause that Somerset West is about 7 hours away from Graaf Reinet. Somerset West is still within the borders of this country. Were it to be found that relocation is best for the child, with properly structured access and visitation schedules between parents, where they would primarily focus on what is best for the child, those hours would become insignificant.
- [30] The matters that are being raised about how and when the visits would occur, maintenance etc. are to be managed, they are matters that the parties themselves, with the help of the Family Advocate, will decide when they work on a parenting plan. It would be premature for me to delve into those issues because, should it be found that relocation is not in the best interests of the minor child, those issues would be rendered obsolete. If relocation is found to be in the best interests of the child, it behoves both parents to work out a parenting plan (because that is their responsibility), being assisted by the Family Advocate.
- [31] In **J v J**⁶, the Court on appeal, found that it was in the best interests of the child that his schooling should not be interrupted *"nor should he be the subject of a further 'full, thorough and proper investigation'. The time has come for the child to be allowed to settle down without further litigation, assessment and investigation"*. These remarks apply with equal force on the issue of a primary caregiver.

⁶ J v J 2008(6) SA 30 CPD at para 43.

[32] The applicant has expressed strong views on the relocation and it is befitting that a proper investigation be conducted as agreed between the parties. It is for those reasons that the scope of the investigation by the Family Advocate must be limited to the interests of the minor child in so far as relocation is concerned. In any event that was the issue that gave rise to these proceedings. To extend the enquiry and the investigation by re- visiting the issue of a primary caregiver will not be in the best interests of the minor child.

[33] I accordingly grant an Order in terms of the Draft Order marked “**A**” agreed to between the parties. I shall in any event record the Order in full below.

ORDER

[34] **I make the following Order:**

IT IS ORDERED BY AGREEMENT THAT:

- 1.1 The application is heard as a matter of urgency and that the Rules relating to time periods are dispensed with in terms of Rule 6(12) of the Rules of the above Honourable Court.**
- 1.2 By agreement, the respondent undertakes, as set out in paragraph 4 of the answering affidavit, and is so interdicted from permanently relocating with the minor child, namely, “SH” from Graaf-Reinet, pending determination of the relief sought in Part B of the notice of motion and pending the finalization of an investigation by the offices of the Family Advocate, and their recommendations in respect of the best interest of the minor child.**
- 1.3 The offices of the Family Advocate are ordered to carry out an investigation, forthwith, and to compile a report setting out their findings and recommendations on the following aspects:**

- 1.3.1 on the best interests of the minor child relating to relocation to Somerset West, Western Cape Province with the respondent;
 - 1.3.2 whether permanent relocation of the minor child with the respondent to Somerset West, Western Cape Province is in the best interests of the minor child;
- 1.4 The application is postponed *sine die* for the determination of the relief sought in Part B of the notice of motion.
- 1.5 The applicant is granted leave to file a replying affidavit within fifteen (15) days of this Order.
- 1.6 Pursuant to the issues which arise from the Family Advocate's report, the parties are granted leave, as follows:
 - 1.6.1 the applicant may amend his notice of motion and supplement his founding affidavit; and
 - 1.6.2 the respondent may amend her notice of motion in the counter-application and supplement her answering affidavit in the main application and her founding affidavit in the counter-application.
- 2. The costs in respect of Part A relief are reserved for determination by the court hearing the Part B relief.

T.V NORMAN
JUDGE OF THE HIGH COURT

Heard on 30 March 2023

Delivered on 04 April 2023

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