IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Case number: 17536/2008

Date: 30 April 2008

NOT REPORTABLE

In the matter between:

KARIN COETSEE Applicant

and

A COETSEE Respondent

JUDGMENT

PRETORIUS J,

In this urgent application the applicant requests the court to make the

following orders:

> *"2. That permission be granted for the applicant to remove the minor children Z C (born 8 February 1996) and A C (born on 13 July 1998) from the Republic of South Africa and to accompany her to Abu Dhabi.*
>
> *3. That the respondent be ordered to sign all the necessary papers for a passport or visa to be obtained by the children and the necessary consent to leave the Republic of South Africa.*
>
> *4. Alternatively, that the Deputy Sheriff of this Honourable Court be authorized to sign all required papers referred to above on behalf of the respondent.*
>
> *5. That the respondent, while the applicant and minor children are resident in Abu Dhabi, shall have the right to have the minor children with him during the June/July/August school holidays, for a period of two months every year.*
>
> *6. Cost of this application."*

The parties were divorced on 27 August 2004. The two children born from the marriage, Z born on 8 February 1996, aged 12 years and A, born on 13 July 1998, aged 9 years were placed in the custody of the applicant at the time of the divorce:

"…custody of the minor children, Z C and A C, will be awarded to the plaintiff."

"… the defendant to exercise access as follows:

3.6.1 every alternative weekend from Friday at 14h00 untill Sunday at 17h00 which includes the right to remove the children for the entire period;

3.6.2 for an equal division of every long school holiday, provided that the minor children will spend each alternate Christmas, New Year and Easter with each parent;

3.6.3 every alternative short school holiday;

3.6.4 every father's day;

3.6.5 every alternative birthday of the defendant that coincides with his turn to have the minor children for Christmas;

3.6.6 every alternative birthday of each of the minor children;

3.6.7 reasonable telephonic access, including telephonic access on every Tuesday, Friday, Saturday and Sunday at 20h00."

The respondent changed his access from every second weekend to every

third weekend since the end of 2007, due to the distance from Nelspruit to Middelburg and the increase in fuel prices.

The applicant is a cytologist. She was head-hunted by a personnel agent in Adu Dhabi and was contacted on 8 January 2008. On 20 March 2008 the applicant received a formal offer of employment in Abu Dhabi. This offer will enable the applicant to earn approximately R27 000.00 per month. She will also receive ± R200 000.00 per annum for housing and provision is made for transport, electricity, furniture and an education allowance for the children. The applicant and children will also enjoy free medical cover and there is no tax deduction in Abu Dhabi

The applicant explains that she considered the offer during the Easter weekend. She discussed it with her parents as well, as she and the children had been living with her parents since the divorce. She says:

> *"The offer came immediately before the Easter weekend and during the Easter break I had time to consider the offer. I then decided to accept the offer after careful thought and discussion with my parents."*

It is clear that she did not make a decision on the spur of the moment. It is clear that the divorce had been acrimonious, to such an extent that the parties are still communicating by text message when they have to make

arrangements regarding the children.

The applicant then made arrangements to request the respondent's permission to take the children to Abu Dhabi. She telephoned him on 28 March 2008 and made an appointment. She arranged for the clinical psychologist, mrs Erasmus, to accompany her to meet the respondent.

Mrs C Erasmus had been suggested by the family advocate to monitor the relationship between the children and the respondent at the time of the divorce and after the divorce and it was agreed by both parties thereto at the time. On 30 March 2008 the applicant and mrs Erasmus met with the respondent. He refused to deal with the merits of the request and they left. Hence the current application.

The applicant sets out that it would be in the best interest of the children is she is allowed to move to Abu Dhabi, as financially she would be in a much better position and more opportunities for the children will be made available. The children will attend the school in Abu Dhabi where the American Syllabus will be followed and they will be taught in English. Z, is a "top ten" learner, who is very excited at the prospect of moving to Abu Dhabi. A, an average learner may need remedial classes with which the school will assist, if necessary. A letter, by mr G van Zyl, the school principal of Laerskool Middelburg, dated 14 April 2008, is attached to the responding affidavit. His

comments are:

> *"Tans is die twee leerders in graad 4 en 6. Hulle pas goed aan in die tweede taal (Engels) en het 'n aanvaarbare kennis en woordeskat…*
>
> *Dit will dus voorkom of Z en A sal aanpas om onderrig in hul tweede taal te ontvang…*
>
> *Hulle vakprestasies in die leerarea Engels is soos volg:*
>
> *Z: Presteer goed in Engels. Sy handhaaf 'n gemiddeld van 80%. Sy is hardwerkend en baie entoesiasties oor Engels. Ek glo dat sy taalgewya baie goed sal aanpas.*
>
> *A: Presteer gemiddeld in Engels. Hy is 'n aangename leerder. Hy handhaaf 'n gemiddeld van 50%."*

It is thus clear that the problems regarding education are unfounded and from the attached curriculum it is clear that all the needs of the children regarding cultural, social and sporting activities will be met.

The main complaint of the respondent is that he will not have the same contact with the children. The applicant has indicated that the children will visit the respondent every June / July holiday for two months at the applicant's cost.

Should the respondent pay for the children's travel during the December

holiday, further visits will be arranged. The applicant offers to assist with practical arrangements and accommodation should the respondent wish to visit the children in Abu Dhabi.

Furthermore the applicant undertakes to install internet and Webcam facilities for the respondent to contact the children daily. The applicant will also ensure that the children have cellphones and that these numbers will be supplied to respondent to enable him to contact the children.

The respondent's objection regarding the lack of Christian religion is be unfounded. The applicant attaches the document from the Afrikaans church in Abu Dhabi which confirms the church service every week.

The applicant and two children will be a family in Abu Dhabi and will still have regular contact with her parents (the children's grandparents)

The applicant acknowledges that a realignment to the appropriate level at school may have to take place as the school year in Abu Dhabi starts in September.

Although counsel for the respondent argued that applicant would not adhere to a court order regarding the visitation rights and right of access of the respondent, there are no facts to substantiate such an argument.

On 24 April 2008 the family advocate, Adv Langeveldt and ms E Beeslaar, a social worker had a consultation with the two minor children and supplied the court with an interm report. It is clear from the report that the applicant and respondent still have unresolved issues with one another resulting in conflict.

Adv Langeveldt is of the opinion that A should be evaluated before a decision can be made. Mr van Zyl, for the applicant argued that the school principal, who is in daily contact with A, was of the opinion that he will be able to cope with English as teaching language. It is also clear, that the applicant has taken A average performance at school into consideration.

The offer to the applicant is *bona fide*. She will be in a much better financial position to care for the children. The respondent did not argue that her request to remove the children to Abu Dhabi is not genuine and reasonable. He could not refute her statement that she is only earning R12 000.00 per month presently. The parties had decided at the time of the divorce that the applicant should be the primary care-giver. Although the family advocate finds that both children do not realise the implications and reality of moving to Abu Dhabi, it is clear that such a move would broaden their horizons and enable them to partake in more activities. Z is quite excited at the prospect and during the meeting with her father the applicant and mrs Erasmus indicated in no uncertain manner that she would like accompany her mother.

Mr Ebersohn, for the respondent, argued that children has the right to a stable home. This court cannot find that they will not have a stable home in Abu Dhabi. The children are accompanying their mother and will still be a family.

In both **Jackson v Jackson 2002 (3) SA 303 (SCA)** and **F v F 2006 (3) SA 42 (SCA)** the courts had to decide whether to give permission for the permanent removal of children from the Republic of South Africa by the custodial parent who was emigrating. That is not the position here. Although there is no fixed term to the contract, the applicant reiterates that she is not emigrating, but will return to South Africa at some stage – the contract being for one to three years.

In **Jackson v Jackson *(supra)*** Scott JA found at p318:

> *"[2] 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. <u>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</u>*

affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same and, while past decisions based on other facts may provide useful guidelines, they do no more than that. By the same token care should be taken not to elevate to rules of law the dicta of Judges made in the context of the peculiar facts and circumstances with which they were concerned." (My underlining)

and in ***F v F (supra)*** Maya AJA found at p49:

"[11] 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. 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."* (My underlining)

The present application differs from the **Jackson v Jackson (supra)** and **F v F (supra)** matters, as in those instances the parents had a close relationship with the children. They had much more contact with the children and in both cases both parents were performing more or less equal parenting roles.

In this instance the respondent has access every third weekend and as was pointed out to him by Z, the new arrangement would in effect give them more days in the year in his custody. It is clear that although both children, according to the family advocate, enjoy contact with the respondent, that they do not have such a strong bond with him, as they see him for a weekend every three weeks and every alternate holiday.

In **du Preez v du Preez 1969 (3) SA 549 (D)** Miller J found at p 533 C – D:

> *"If the custodian parent has bona fide and sincerely resolved upon a particular course because he feels it to be in the best*

> *interest of the child, the Court will not substitute its discretion for his merely because it consider that it would have followed a different course; it would have to be satisfied that the custodian parent, although bona fide, was misguided or mistaken and not acting in the true interests of the child"*

In this instance there is no counter-application from the respondent for custody or to be the primary care-giver of the children, as one may expect in such matters. He is objecting on the grounds of the children's education in English, on religious grounds and the fact that A, a little boy of nine, will no longer be able to play rugby or to attend rugby matches with his father.

The latter cannot be sustained as the children will be visiting South Africa during the months that rugby is played and A will be able to bond with his father. The respondent will further have contact with his father on a daily basis as the applicant is providing internet and a webcam.

Nowhere did the respondent set out that the decision by the applicant is not *bona fide* and that the offer does not place her in a much better position to care for the children. The respondent does not offer to pay more maintenance to enable the applicant to maintain the children in a better way – he does not offer any solutions, but only forsees difficulties and offers objections.

The respondent has not been involved in the children's day to day lives, as he only exercise his access every third weekend and alternative school holidays.

I have carefully read all the papers, considered the family advocate's report, listened and weighed all the arguments by counsel and the only conclusion I can come to is that the applicant has made the decision to accept the contract in Abu Dhabi in a reasonable and *bona fide* manner, without any ulterior motives.

The only question that remains is whether it is in the best interest of the two minor children. Having regard to the *dictum* in ***Jackson v Jackson (supra)*** by Scott JA as set out above, I find that it will be in the best interest of the children to accompany their mother to Abu Dhabi. The objections and difficulties raised by the respondent have been addressed and although the children will miss their three weekly visits to their father, the respondent, the long visits in June / July / August and the daily internet contact will enhance the relationship with the respondent.

I cannot find that the applicant is a bitter person who is accepting this lucrative offer only to spite the respondent and for lucrative gain. She has set out that she has taken the children's best interest into consideration at all times and the court finds that it will be in the best interest of the children to accompany their mother to Abu Dhabi.

The following order is made:

1. That permission be granted for the applicant to remove the minor children Z C (born 8 February 1996) and A C (born on 13 July 1998) from the Republic of South Africa and to accompany her to Abu Dhabi.
2. That the respondent be ordered to sign all the necessary papers for a passport or visa to be obtained by the children and the necessary consent to leave the Republic of South Africa.
3. That the respondent, while the applicant and minor children are resident in Abu Dhabi, shall have the right to have the minor children with him during the June/July/August school holidays, for a period of two months every year and that the applicant will pay the minor children's return air tickets for such a visit.

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C Pretorius (Ms)

Judge of the High Court

Case number	:	17536/2008
Heard on	:	24 April 2008
For the Applicant	:	Mr van Zyl
Instructed by	:	GJ van Zyl
For the Respondent	:	Dr
Instructed by	:	Ebersohn
Date of Judgment	:	30 April 2008