REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: **36973/2017**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED

11/10/2017 _____

DATE SIGNATURE

In the matter between:

J O Applicant

and

A O Respondent

JUDGMENT

FISHER J:

[1] This application comes before me in the urgent court. The parties are married but in the process of divorcing each other. They have 3 daughters: A aged 7 and twin girls, C and H aged 5.

[2] The children currently reside with the respondent, their mother. They have done so since February 2016. The Family Advocate has previously produced a report in the matter. At the stage that this report was drawn, being during 2014, the children lived with both parties on the basis that residency was shared on a fortnightly basis.

[3] The Family Advocate was assisted by a Family Counsellor and a Social worker, Ms Kriek and Ms Griessel respectively. The conclusion of the Family Advocate – with reference to the reporting of Ms Kriek and Ms Griessel was essentially to the effect that it is in the interests of the children that they have regular and sustained contact with both parents.

[4] Initially, on the recommendation of the Family Advocate, the parties followed a contact routine which provided for Mr O to exercise contact for 3 weekends each month and a midweek sleepover each week. During May 2016, the parties agreed that it would be in the interests of the children for the midweek visit to be eliminated and the programme to rather be 3 weekends with Mr O from after school on Friday of each of the access weekends to the Monday morning when they would be delivered to school.

[5] Mr O currently lives in Germiston and Mrs O in Centurion. The current contact arrangement has been working and, by all accounts, the children are well settled into it and well served by it. A attends grade 1 at an English medium School, […], and the twins attend this school's feeder playschool.

[6] During late August 2017 Mr O found out per chance from the children that they were to be moving from Johannesburg to Upington with their mother. Mr O tried to find out more by communicating by text message with Mrs O. There was no proper response to Mr O's fervent enquiries in relation to this relocation of his children. He thus instructed his attorney to intervene in the matter.

[7] On 29 August 2017 Mr O's attorneys, per Mr Montepara, wrote a letter advising that Mr O objected to any proposed move of the children. In terms of the letter it was proposed that the parties mediate this dispute.

[8] Mrs O's attorney, Ms Cynthia van Dyk did not respond to this letter. On 31 August 2017 this letter was followed up with a further letter from Mr O's attorneys stating *inter alia* that the proposed move was not in the interest of the children and proposing that the children live with Mr O.

[9] On 6 September 2017, Mr O was copied on an email from Mrs O terminating the children's attendance at their schools with effect from 29 September 2017. On the same date, Mrs O sent an email to Mr O in terms of which he was informed that she intended to move with the children to Groblershoop in Upington and that she had arranged for them to attend the Groblershoop Primary School. Mr O again registered his objection by way of return email. It is clear that at this late stage of the relocation process Mrs O had not yet seen fit to discuss her plans with Mr O. She has unilatrally decided on the move.

[10] By 8 September 2017 there had still been no engagement from Attorney van Dyk. A further letter was written by Mr O's attorneys asking for a response and threatening the bringing of urgent proceedings if there was no constructive engagement.

[11] Despite these entreaties there was still no response. This is indeed of some concern given the pressing nature of the matter and the rights and interests of the children at stake.

[12] On 13 September Mr O's attorney attempted to contact Ms van Dyk by telephone. She was not available and a message was left for her to call him urgently. The call was not returned. On 14 September yet a further letter was sent asking for a response.

[13] It was only on 18 September 2017 that there was some second-hand engagement from an unnamed person on behalf of Ms van Dyk to the effect that Mrs van Dyk was ill and had been away from the office – but that she would now attend to respond to the previously unanswered correspondence.

[14] Notwithstanding this undertaking to respond, nothing was forthcoming from Ms van Dyk. Thus, on 26 September 2017, Mr O's attorney yet again attempted telephonic contact with Ms van Dyk and this time succeeded. He asked for an undertaking that the children could remain in Johannesburg at their schools until further negotiations took place. An undertaking was exacted from Ms van Dyk that she would revert the next morning. True to form, this undertaking was not met.

[15] In the afternoon of 27 September 2017 Mr O's attorney again called the firm to speak to Ms van Dyk. Instead he spoke to one of the directors, Mr Erasmus who undertook to look into the matter and revert.

[16] There has been no relenting on the part of Mrs O. She is intent on taking up a job which she says she has been offered and moving to Groblershoop which is approximately 800 km from where Mr O resides.

[17] This application was thus brought by Mr O. In essence, he seeks that there be a fresh investigation by the Family Advocate into the best interests of the children with specific reference to whether they should be relocated.

[18] Mrs O now, in the context of this urgent application, agrees that an

investigation by the Family Advocate ensue. She contends however that, in the interim to this investigation and the consequent determination of what serves the interests of the children, the children should move with her to the new life planned for them by her.

[19] She motivates this contentention on the basis that she says that she is bonded to the children; that they are girls and thus need their mother; that without the taking up of this position she is unable financially to survive and serve the children's needs. The parents of Mrs O live near Groblershoop and she will have their support she says.

[20] Mr O expresses concern that there has not been proper consultation and forethought in relation to the interests of the children and the need and desirability for them to relocate 800 km away from their father. Given their ages and the indications in the reports referred to above – it seems that they are unlikely to make the relocation without some substantial discomfort to them. How far this goes in relation to the determination of their wellbeing ultimately is not for me to decide and neither have I been afforded the information with which to evaluate the interests of the children in this context. This is, to a large extent, as a result of the sudden and seemingly capricious decision to move the children to Groblershoop and the failure on the part of Mrs O and her attorneys to engage constructively in relation to the interests of the children in this context.

[21] My assessment of the present *status quo* is that it has been carefully designed with the assistance of experts to meet the needs of these children. They have settled into a routine where they have, up until now, enjoyed optimal access to both parents and a relatively stable environment and routine. A stable routine is unversally determined to be in the interests of children, especially those of a young age.

[22] My view is that it would not now be in the interests of the children for them to be taken out of their current routine and living circumstances. If Mrs O feels intent on taking up the job opportunity in Groblershoop then she will do so on the basis that the children do not move with her.

[23] I am satisfied that the children can be properly accommodated by Mr O should this become necessary and that their interests will be served by them staying in Johannesburg with Mr O, should Mrs O insist on relocating. I am satisfied that, in such event, it would serve their interests for them to reside in Johannesburg with their father and continue to attend their schools. It would not, to my mind, serve them or the parties if they were required, pending a proper consideration of their best interests, to uproot them.

[24] It is not disputed that if new living circumstances were created in Groblershooop in the interim, this could potentially create the possibility of further upheavel.

[25] As to costs, I was urged to grant costs on the attorney and client scale and that such costs also be awarded *de bonis propiis* against the attorney of the respondent. Whilst I agree that the attorney has acted in a manner which is not befitting her position, especially given the serious nature of this matter, I cannot find that, had she complied with all her obligations, this application would have been avoided. It seems to me that the respondent would nonetheless have been intent on the move of the children and the applicant intent on arresting it. It does however seem to me that Mrs O has herself acted capriciously and without due regard to the interest of the children in her approach to the proposed sudden move to Groblershoop. This, however, in itself does not suffice in my view to attract a punitive order for costs. There is no real indication that, even if she had behaved with due regard to the interests of the children (which she did not) that an application would have been avoided.

ORDER

[26] I thus make the following order:

(a) The matter is urgent and is dealt with as such;

(b) The Family Advocate is requested to conduct an investigation and produce a report as to the best interests of the children, including specific reference to where they should live and how their parents should have contact with them, which investigation and reporting should be dealt with as soon as possible;

(c) Pending a determination by a court as to the relocation of the children from Gauteng:

i. the respondent is prohibited from removing the children from Gauteng without the consent of the applicant;

ii. Should the respondent move to reside in a residence where she resides outside Gauteng, the primary place of residence of the children will then be with the applicant, subject to the respondents reasonable rights to have contact with the children;

(d) The respondent is to pay the costs of this application.

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D FISHER

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING:	**10 October 2017**
DATE OF JUDGMENT AND ORDER:	**11 October 2017**
LEGAL REPRESENTATIVES:	
FOR THE APPLICANT:	**Adv Killops Instructed By Malherbe Rigg & Ranwell Inc.**
FOR THE RESPONDENT:	**Adv Pletschke Instructed by Erasmus Attorneys**