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

Case Number: **2024-067811**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
_____	_____
DATE	SIGNATURE

In the matter between:

V[…] D[…] B[…], S[…] Applicant

And

V[…] D[…] B[…], H[…] E[…] Respondent

JUDGMENT

Mahomed J

[1] The Applicant a father, applies on an urgent basis for interdictory relief in terms of R6, for an order preventing the Respondent the mother, from relocating with their two children to Cape Town, pending the finalisation of a psychologist report. Furthermore, the Applicant prays for an order for primary residence of the children, in

terms of R43(6). The Respondent was granted primary residence in the R43 application, the contact is set out in the order[1] which included sleep overs with their father. The Applicant contended that the children spent 14 days of a month with him, although further evidence was that he often sought changes to the arrangement at short notice and spent on average between 7 and 9 days a month since 2022. The psychologist was mandated to investigate allegations of drug and alcohol abuse of both parents and the access rights and the best interests of their children, as per the court order dated 15 October 2024.

[2] Advocate F Bezuidenhout appeared for the Applicant and submitted that her client is permitted to file a reply in terms of Rule 6 and that in his papers the applicant sets out that he adopts a two pronged approach to the application. The Respondent argued she had not had an opportunity to respond to the reply in which the Applicant is repetitive, irrelevant and simply takes "another bite of the cherry." I noted Ms Bezuidenhout submissions that material information as to her employment was only disclosed in her answering papers and those facts needed to be addressed. I proposed to apply my discretion on the information I require and the weight that I would attach to the papers in reply in terms of R43(5), see Bader v Weston.[2] The family law environment is dynamic by its nature, a court must be apprised of all relevant facts up to the very date of a hearing.

[3] The Respondent filed a conditional counterclaim in which she prays for, inter alia, an order permitting her to relocate with the children to Cape Town, an order for a contribution towards her legal costs and for a variation of the applicants contact rights to accommodate their move to Cape Town. She contended that her business has suffered serious financial losses, and she was forced to seek employment as an IT specialist, she found employment after four months of searching and the position requires that she move to Cape Town.

[4] Adv. A Koekemoer appeared for the Respondent and submitted the finalisation of the report is simply another way that the Applicant continues to control her client, the Applicant on his version did not think the report was necessary, when

[1] CL 000-2
[2] 1967 (1) SA 134 C

they were in discussions to settle the divorce. The impression I gained is that the divorce is capable of settlement and this leg of litigation is simply a waste of resources that could be ploughed back into the family. The papers in this application are shockingly prolix, and unnecessary, the Respondent is obviously forced to answer, and it is noteworthy that she is in financial difficulties already she could do without additional legal costs.

[5] The evidence is that the Applicant has rejected all efforts to arrive at a new arrangement to exercise his contact rights, he is concerned that it will cost him more to see his children and he is prejudiced in that he will see them on fewer days than he does currently. According to the Respondent the Applicant simply dragged his heels on the appointment of the psychologist, her evidence is that she approached the Applicant for his cooperation on the appointment of an expert immediately after the order was granted. It is common cause that he was to pay for the experts costs which were to be set off against her share later. The Respondent contended that he made serious allegations against her in the R43 hearing and she was keen on addressing the points to ensure progress in the finalisation of the divorce. She could not afford an attorney and for the most part represented herself. Adv. Koekemoer for the Respondent contended that when the expert was appointed her client gave her full cooperation to the process and did so timeously. She argued that in November 2024 the Applicant advised the Respondent that he did not think the report was necessary and suggested that they simply proceed to finalise their divorce, he tells a different story now when she seeks to help herself and be the mother she wants to be.

[6] In December 2024 the expert indicated that although the Respondent would commence the interview process however, she anticipated that it would continue into early 2025. She was unable to guarantee that it will be completed before the Respondent is to commence her job in April 2025. Furthermore, in April 2025 the children are due to commence their school term in Cape Town. The Respondent tendered payment for travel costs of the expert to Cape Town if necessary to finalise the children's interviews. Adv. Koekemoer proffered " there is nothing one can do with a "blank no for a response" and contended that the applicant refused to attend a mediation, refused to cooperate with responses to issues raised, failed to provide

alternative suggestions, he refused to participate in a “voice of the child” investigation, he places his full reliance on the outcome of the expert report and until it is finalised, his view is that the applicant may go ahead and work in Cape Town, but he refuses to consent to the children going along with her.

[7] Adv. Bezuidenhout for the Applicant contended that the parties have a “shared residency arrangement” since 2022, the children spend almost 14 days of the month with their father, they are with the applicant for almost half the month. The counter argument before this court is that the applicant has on several occasions changed plans at the last minute, when he has been unable to exercise his contact, it was argued that he quite regularly, only exercised contact for half of his allocated time.

[8] The Applicant contends that a move would be disruptive and not in the best interest of the children. They would have to make new friends, establish relationships with teachers, and adjust to new environments. Furthermore, the Applicant contends that “he can keep watch over them, in the light of the Respondent’s problem with drugs. Therefore the status quo should remain until the assessment if done, he is unwilling to mediate unless she agrees not to move to Cape Town.

[9] The experts investigation process was delayed because the Applicant had to find the money to pay for her services, and his evidence is that just as he managed to find the funds, he learnt of the respondent’s plans and is therefore he forced to launch this application. The evidence is that the applicant is a successful businessman, who works in the family business. Adv. Bezuidenhou reminded this court that the Respondent has her own idea of her rights as a parent, she has failed to consult with the other parent, regarding the move, she informed schools of the move before she advised the applicant.

[10] It was contended by the Applicant that the Respondent fails to comply with the Children’s Act in terms her duties as a co-parent which was denied. The Respondent contended that the Applicant refuses to co-operate with Respondent’s attorneys and has been called on two occasions to mediate the matter, to hold a round table to discuss in particular for an approach to their co-parenting arrangements in the future.

Ms Koekemoer submitted that the Respondent has made every effort to comply with her obligations in s 31 of the Children's Act, the applicant will not engage on the issue.

[11] In my view the provisions in the Act on access, contemplates engagement with the issues raised and it is only successful if both parties engage, the respondent argued that the Applicant refuses to engage on issues raised, he offers no suggestions, he maintains his stance that the family cannot move to Cape Town for reasons set out earlier, his view is that it is practical for them to be permanently situated in their known environment. Ms Bezuidenhout proffered that her client can also keep an eye on them.

URGENCY

[12] Advocate Bezuidenhout submitted that the issue of urgency becomes a moot point as there is urgency on the arguments of both parties. Counsel contended that the Respondents aim is to put an end to the shared residency arrangement, by rushing off now with the children. She only advised the Applicant of the move after she had confirmed arrangements with the schools, it was contended it was a situation of a fait accompli. I have difficulty with accepting this contention, there was no evidence before me of a proper and meaningful engagement by the applicant with issues that concerned him regarding the best interests of the children. A party who refuses to co-operate and engage, cannot sit around pouting, the party must take responsibility for failing to work at a solution. The Act presupposes adults engaging and being solution minded and bearing in mind the best interest of their minor children. There appears no opportunity for me to exercise a discretion regarding urgency, the Respondent has placed her timelines, which is not appreciated, but I must view her actions in the context of her limited financial resources and to litigate at the same level as the applicant. I am inclined to agree with Adv. Bezuidenhout that the issue of urgency is moot, both parties sought relief in relation to the April 2025 timeline.

THE RELOCATION APPLICATION

[13] The Applicant does not dispute the dire financial situation that the Respondent finds herself in, the evidence is that he does not pay her maintenance but rather contributes R 5000 per month toward her credit card. I am of the view that the Respondent is bona fides in her decision to move, and that the move is justifiable, she set out her challenges with banks, credit bureaus and informed the court she is at risk of losing the home that she and her children live in. She needs to earn a living to support herself and her children to retain her dignity and her rights as their mother.

[14] I am of the view that she adopted a rational and considered approach, she provided the necessary employment documents, presumably when they became available to her, there is only a supposition that suggests a delay , she presented information on their new home, she stated that the children will continue to have a support system, their grandfather will join them in their new home, the children's special needs were considered and information on the schools and curriculum was made available. There no dispute in that regard except of a lame attempt in the replying affidavit, which takes a strike at the grandfather's competence at this belated stage. I noted no objections to his living with the respondent and their children whilst in Johannesburg. The arguments raised in the replying affidavit on the pretext of a R6 application, were weak as the facts were never an "issue" before the move to Cape Town was announced.

[15] In my view a parent who approaches the court on an urgent basis and is concerned for his children, that the move is imminent, would logically cooperate and hold a voice of the child investigation to determine their best interest, who better than the children themselves to convey their choice of place to live. The Respondent secured an expert to investigate this the Applicant rejected the holding of a voice of the child investigation. Adv. Buzuidenhout for the Applicant submitted that the psychologist Ms. Mahogney will attend to this aspect in due course, however that raises the question as to why not hear them now. If the applicant heard the children and he was correct, it would have assisted his opposition to this move. It seems to me that he was not confident as to their best interest and uses the pending report as an opportunity to continue his control over the respondent, albeit he has no objection to her moving, but without the children. It is noteworthy that the applicant considered the respondent to be "a good mother", I see no reason why she would not continue

to be the same mother in Cape Town. Our constitution guarantees freedom of movement[3] and dignity[4], this court cannot be held to ransom to allay the fears of a party.

[16] Section 31(2)(a)of the Act obliges parents holding rights and responsibilities to give due consideration to the views and wishes expressed by the co holder of parental rights and responsibilities in respect of the child. Adv. Koekemoer for the Respondent argued there is nothing that one can do with a "blank no" from the applicant, he remained belligerent. I agree.

[17] Adv. Bezuidenhout for the Applicant argued that the Respondent's counterapplication and her answering papers were in essence a relocation application which R43 does not provide for. I understand the technical point raised however the issue arises from the award of primary residency and rights of access by the non-custodial parent. I am loathe to dismiss the application for that reason alone. The history of the matter is before me, the details for consideration of the rights and obligation of the parents are before me, there is no evidence from either party that it is not in the children's best interest, the applicant merely makes a bald statement to bolster his version but nothing concrete is before me to deny the respondent a hearing on this aspect. The Applicant states she is a good mother.

[18] In *F v F*[5]**,** Maya AJA recognised that the courts in such matters consistently applied the approach that the children's best interests are paramount. What is in their best interest will depend on the facts of each case. Satchwell J in *LW v DB*[6], provided guidelines with reference to the provision of our Constitution on the consideration of relocation of children. The court stated the following to be considered:

" 1. *The interests of the children are the first and paramount consideration.*

2. Each case is to be decided on its own particular facts.

[3] S 21(3), Act 108 of 1996
[4] S 18, Act 108 of 1996
[5] 2006 (3) SA 42 (SCA) at 47 para 8
[6] 2020 (1) SA 169 (GJ) AT 176 para 20

3. Both parents have joint primary responsibility for raising the child and where parents are separated the child has the right and the parents the responsibility to ensure that contact is maintained.

4. 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.

5. 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 the children remain a vexed question."

[19] The Respondent has made several proposals to the Applicant including an increase in contact hours when he visits them in Cape Town, she identified possible accommodation which is available to him in Cape Town, I do not think she can be faulted in ensuring that he maintains contact with his children. The applicant must take responsibility for failing to cooperate with the respondent in arriving at workable solutions to continue to exercise contact with his children in Cape Town. The ethos in parent participation in the Children's Act is clear, cooperation between parents toward a harmonious relationship in the best interest of the children.

[20] Maya AJA recognises that in *F v F* supra, at paragraph 11 where the court stated:

"*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, in 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.*"

[21] I mentioned earlier, there is very little before me regarding the children and volumes before me regarding the parties and their behaviours, they know their children, if there was any fact of substance against their move, I have no doubt it would have been before me, the usual issues of adjustment to new friends and

environment, is simply par for the course. The incomplete report cannot stand in the way of the life of the respondent, she is not only looking for a life enhancing opportunity in Cape Town, she is asking this court to assist in her attempts to survive and be a normal parent to her children. The court cannot deny her the support she needs, and it cannot "*be held hostage to the feelings of aggrieved litigants."* [7]

[22] In LW v DB[8], the court stated

"*The solution of our court can never be to order that separated parents must live at close proximity to each other in order that each parent lives in close proximity to their child. Our courts have not been appointed the guardians of adults and parents are not the prisoners of our courts*." This court fully agrees with the learned judges understanding of the role of our courts and I therefore, implored counsels to provide practical solutions.

[23] Adv. Bezuidenhout suggested the practical solution would be for the Respondent to go ahead with her work plans, and leave her children to their father, until a report is available, or she can remain in Johannesburg, where "*they would keep an eye on one another*". I might have taken counsel seriously, if I were not doubtful of the Applicant's commitment to his children, the evidence is that he does not have a healthy relationship with his daughter. I also question his motives in that if he really cared for his children's best interest, he would have cooperated with the holding of the voice of the child investigation now, not when the appointed psychologist can fit them into the diary after April 2025.

[24] I am of the view that there is nothing that prevents the continuation of the expert reporting process, the respondent has given most aspects much thought, she will ensure that the process is facilitated regarding the children when the expert requires to interview them. On several accounts a move to Cape Town, would be an adventure for the young minds, and they are old enough to express their opinion, if they no longer enjoy their life in Cape Town, they have an option to return to their father, the world has become an oyster for many young people however much depends on the nurturing toward a positive outlook on life.

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[7] F v F fn 1
[8] LW v DB [2019] ZAGPHC

CONTRIBUTION TOWARD LEGAL COSTS

[25] *In S v S and Another* [9], the court stated:

" Applicants in Rule 43 applications are almost invariably women who, as in most countries, occupy the lowest economic rung and are generally in a less favourable financial position than their husbands. Black women in South Africa historically have been doubly oppressed by both their race and gender. The inferior economic position of women is a stark reality. The gender imbalance in homes and society in general remains a challenge both for society at large and our courts. This is particularly apparent in applications for maintenance where systemic failures to enforce maintenance order have negatively impacted on the rule of law. It is women who are primarily left to nurture their children and shoulder the related financial burden. To alleviate the burden the courts must ensure that the existing legal framework, to protect the most vulnerable groups in society, operates effectively."

[26] Our courts in several judgments[10] have held that the equality provisions in our Constitution enjoin the courts to order that parties be supported to litigate on an equal footing, litigants are entitled to a fair trial. It is common cause that the Respondent is in financial trouble and will require costs for future litigation, given that the parties are unable to resolve their disputes in more cost effective ways and the litigation is protracted. It is noteworthy that the applicant has engaged the service of senior counsel and the volume of the papers on file speaks to the high costs of this leg of the litigation. The parties have not disclosed what has been spent to date on legal costs, but what is certain it is an expensive process. I considered the respondents submission on past costs of litigation and future costs up to the first day of trial. I noted the Applicant's arguments in the reply to the counterapplication in the pro forma invoice. I am of the view that the claim for a contribution is fair in the circumstances, less the costs of this urgent application. The balance available on the first day of trial must be returned to the Applicant. There is always a risk that an

[9] 2019 ZACC 22 at 3
[10] See H v H 44450/22 JHC p20 [77 -78], Van Rippen v Van Rippen, VR v VR, Cary v Cary

award of too small an amount will lead to additional litigation costs to seek an increase.

COSTS

[27] The Applicant could have co-operated with this process and avoided unnecessary litigation, he was non responsive on several occasions, he appeared to put his interest above those of his children, particularly when he refused to hear their views. He knew of the Respondents dire financial situation, she had earlier relied on pro bono services and represented herself at times. The respondent's approach to the relocation is regrettable, however, she has provided the court with sufficient relevant information to grant her the order she seeks. The papers were prolix, this court simply cannot spend time calculating pages, but "the parties know they have tried to throw everything in and wait to see what sticks", this is not what the rule contemplates, and the rules board must address this dire situation. In view of the way parties have conducted themselves, almost an affront to a Bench, I am of the view that each party is to pay their own costs.

[28] Accordingly, I make the following order:

1. The application for an interdict is dismissed.
2. The application for a grant of primary residence to the Applicant is refused.
3. The Respondent is permitted to relocate together with the two minor children, A[…] v[…] d[…] B[…] born on 10 May 2011 and J[…] v[…] d[…] B[…] born on 24 October 2014 from Gauteng to Cape Town.
4. The Respondent is ordered to do all that is necessary to assist the psychologist Ms O' Mahony to complete her report, and is to pay for the children's costs of travel, if necessary.
5. Paragraphs 4 and 5 of the order dated 15 October 2024 is varied as follows:

5.1 Pending finalisation of the assessment and publication of the recommendations of the psychologist the minor children shall remain primarily resident with their mother H[…] E[…] v[…] d[…] B[…] and their father S[…]

v[…] d[…] B[…] will exercise reasonable rights of contact to the minor children which includes:

5.1 Sleepover contact on a Friday after school until a Monday morning before school for three weekends per month.

5.2 the short school holidays to rotate between parties

5.3 the long school holidays to be split between the parties with the respondent entitled to four additional sleepover days.

5.4 Daily contact on cellphone after school, which is not to interfere with the children's scholastic, cultural , sports and other activities.

6. The Applicant shall contribute towards the legal costs, up to the first day of trial, the sum of R115 000 payable within 4 months from date of this Order. Any balance is to be repaid to the applicant within three days of first day of trial.

7. Each party is to pay their own costs.

MAHOMED J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 11 March 2025
Date of Judgment: 20 March 2025.

For the Applicant:
Adv F. Bezuidenhout instructed by Vanessa Fernihough & Associates

For the Respondent:
Adv. A. Koekemoer instructed by Zinta Coetzee Attorneys Inc.