

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case no: 85507/2018

REPORTABLE: **NO/YES**

OF INTEREST TO OTHER JUDGES: **NO/YES**

REVISED. **NO/YES**

13 MAY 202

In the matter between:

I[....] K[....]

Applicant

and

G[....] H[....] A[....] S[....]

Respondent

JUDGMENT

MAKHOB A J

1. The applicant and respondent were previously married to each other, they separated during April 2013 and divorced on 2 June 2014. A child was born of their marriage. The minor child is hereinafter referred to as L. L was born on the 11th March 2011.

2. In terms of the settlement agreement which was made an order of court the primary residence and care of the minor child was awarded to the applicant, subject to rights of contact to the respondent, which includes rights of removal on every

Wednesday afternoon for a sleepover, as well as alternative weekends from Friday until Monday morning, and half of every school holiday.

FACTUAL BACKGROUND

3. The respondent is married to L[....]2. L[....]2 has a daughter from a previous marriage, K[...] who is 3(three) months older than L. The applicant is married to Stephan who is employed in Dubai in the United Arab Emirates since 7 June 2017 and he is still working and living there.

4. In June 2018 the applicant launched an application seeking permission from the court to relocate together with her minor daughter L to Dubai. However, the applicant withdrew that application and tendered the respondent's costs.

5. On the 26th November 2018 the applicant launched the second relocation application seeking the same relief as in the first relocation application.

6. The application is opposed by the respondent. The respondent launched a counter-application seeking an order for primary care and residency of the minor daughter in the event of the applicant relocating to the UAE or anywhere else. The applicant has however, made it clear that she will not relocate without the minor daughter.

7. The family advocate issued a report dated 18 May 2021. The recommendation of the family advocate is not acceptable to the respondent.

8. The respondent launched an interlocutory application seeking certain interim relief. Judgment was delivered on the 10th February 2022 by Manyathi AJ¹. The court ordered that the application dated 26 November 2018 is postponed *sine die* and the interlocutory application dated 25 August 2021 is dismissed with costs.

COMMON CAUSE

¹ Caselines 00-1

9. It is common cause that the respondent is very close to her daughter and he exercises his rights of contact regularly. L has also a close relationship with her father (the respondent). She struggles to cope when she is away from the applicant for long periods².

10. It is further not in dispute that L has a good relationship with the respondent's wife and also applicant's husband. The respondent has a step-daughter K[....] and L has a good relationship with K[....].

ISSUES BETWEEN THE PARTIES

11. The dispute between the parties is whether it is in L's best interest to relocate with the applicant to Dubai. It is also in dispute which party must pay the costs of this application.

12. The family advocate Ms Ingrid Eberlanz with the assistance of the family counsellor Mr Hattingh a social worker conducted an investigation on the issue of L relocating to Dubai. They recommended that the applicant be permitted to relocate to Dubai with the minor child. They recommended further that the respondent shall have contact with the minor child during long school holidays in Dubai. Electronic contact with the minor to be agreed upon between the parties.

13. The respondent submitted that the family advocate's recommendation and investigation is lacking and as a result thereof the court is not in a position to properly adjudicate upon the main application and determine the best interest of the minor child³.

14. The respondent further submitted that the family advocate ignored the recommendations by Ms Emmerich (psychologist) and came to the incorrect conclusion in respect of the best interests of the minor child which is not supported by the expert evidence provided by the psychologist (Ms Emmerich).

² Caselines 11-6

³ Caselines 11-34

15. In addition, the respondent submitted that the family advocate ignored the recommendation that a psychologist in Dubai be appointed to give an opinion on the possible inter personal relationship between the applicant and her husband is likely to be in Dubai.

16. Prior to the date of hearing counsel for the respondent uploaded a letter from L which is addressed to the legal aid⁴.

17. In a nutshell in this letter L request for legal assistance from the legal aid and also gives reasons why she does not want to relocate to Dubai together with her mother (the applicant).

18. Responding to these recent developments the applicant also uploaded an affidavit⁵ in which she objects to the handing in of the letter as it is contrary to the court rules. Counsel for the applicant also objected to the letter because it is not under oath and was not properly put before court.

19. I must first determine whether this court can consider the letter by L which I have referred to above. In *Pand Another v Pand Another*⁶ Hurt J said the following “*I am bound, in considering what is in the best interest of G, to take everything into account which has happened in the past, even after the close of pleadings and in fact right up to today*”

20. I am of the view that I am duty bound to take into account the letter by L although it does not carry the same weight as an affidavit⁷.

21. Of primary importance in this matter this court must determine whether it is in the best interest of L to relocate to Dubai. The parents’ rights towards L are subservient to the rights of L⁸.

⁴ Caseline24-1

⁵ Caseline 26-1

⁶ 2002 (6) SA 105 (N) at 110 para C-D

⁷ S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 at page 244 para 15 the court said “...courts must function in a manner which at all times shows due respect for children’s rights”

22. In *F v F*⁹ in an appeal the court set out the test to be applied by the court in determining whether or not the proposed move is indeed in the best interest of the minor child. The court stated the guiding principle as follows:

(a) The court must carefully evaluate, weigh and balance various competing factors including the child's wishes.

(b) The reasonableness of the custodian's decision to relocate.

(c) The practical and other considerations on which such decision is based.

(d) Advantages and disadvantages to the child of the proposed relocation.

(e) The court must not interfere with a parent's right to choose how and where to live.

23. In this matter the family advocate report compiled by Ms Ingrid Eberlanz is in almost direct conflict with the report by Ms M. Emmerich (Educational Psychologist).

24. The family advocate recommends that L can relocate with her mother to Dubai subject to certain conditions which will accommodate the respondent in how to have contact with her. Whereas Ms Emmerich's report suggest certain investigations to be done in Dubai before L relocates.

25. The letter which indicates L's unwillingness to relocate to Dubai cannot be ignored by this court. I am obliged to take it into account.

⁸ See section 7(1) of the Childrens Act; *HG v CG* 2010 (3) SA 352 (ECP) at para 4, p354 see also *Terblanche v Terblanche* 1992 (1) SA 501 (W) at 504

⁹ (2006) (1) ALL SA 571 SCA 13; See *Jackson v Jackson* 2002 (2) SA 303 at 318 para 2 and *LW v DB* 2020 (1) SA 169 (GJ) at 176, para 20

26. Considering all the evidence before me including the letter by L¹⁰ to the legal aid I am of the view that it will not be in L's best interest to relocate with the applicant to Dubai.

27. Moreover, there is no proper arrangement between the parties how will the respondent maintain contact with L and who will finance the trips to and from Dubai. In other words, who will finance the trips to Dubai. It is not stated what will happen should the mother fail to bring L to South Africa during school holidays. It is obvious that once L leaves South Africa the respondent cannot enforce a South African court order in Dubai. There is no amicable agreement between the parties in this regard.

28. The respondent and his family have a strong bond with L. The respondents rights must also be protected by this court. The court must also guard against gender discrimination¹¹.

29. It is beyond doubt that L has close emotional bonds with both her mother and father extended relatives.

30. I, therefore find that the proposed relocation of L to Dubai is not in the best interest L.

31. In my view L's interest would be served by remaining in proximity to both parents and that a separation from either parent would be prejudicial to her wellbeing especially when there is no amicable agreement between the applicant and the respondent.

32. Contrary to the view expressed by Counsel for the applicant it is my respectful view that in pursuing these proceedings both parties acted *bona fide* in what each perceived to be their child's best interests.

33. This being so, I am of the view that each party should bear his or her own costs.

¹⁰ F v F *supra*

¹¹ F v F *supra* at page 576 para 12

34. The following order is made:

34.1 The application is dismissed.

34.2 Each party is ordered to pay his or her own costs.

**D MAKHOB
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

For the applicant: Advocate Ilse Vermaak-Hay

**Instructed by: Kruger Wilkens Attorneys
c/o Sanet De Lange Inc**

For the respondent: Advocate Natasha van Niekerk

**Instructed by: Arthur Channon Attorneys
c/o De Jager Attorneys**

Date heard: 20 April 2022

Date of Judgment: 13 May 2022