IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D376/2020 and D1062/2021

In the matter between:

W[…] E[…] S[….] **PLAINTIFF**

And

N[…] V[…] **DEFENDANT**

This judgment was handed electronically by transmission to the parties' representatives by email. The date and time for hand down is deemed to be on 06 June 2025 at 12:00

ORDER

The following order is granted:

1. The defendant is granted leave to remove the minor child, H[…] W[…] E[…] E[…] S[…], a boy born on 5 December 2013, permanently from the Republic of South Africa, in order to relocate to Portugal.
2. The plaintiff's consent for the minor child's permanent removal from the Republic

of South Africa and his relocation to Portugal, as required by section 18(3)*(c)*(iii) of the Children's Act 38 of 2005, is hereby dispensed with.

3. The minor child is entitled to depart from the Republic of South Africa and re-enter the Republic of South Africa without the requirement of a parental consent letter from the plaintiff, as provided for in regulation 6(12B) of the Immigration Regulations, 2014 to the Immigration Act 13 of 2002, subject to compliance with the remaining provisions of regulation 6 to the said Act.

4. On relocation of the minor child to Portugal, the plaintiff shall be entitled to exercise contact with the minor child, as follows:

4.1 Direct physical contact:

4.1.1 for a period of six weeks during the minor child's European summer school holiday of each year in South Africa;

4.1.2 for a period of ten days during the minor child's European winter school holiday of each year in South Africa; and

4.1.3 at any stage during the year should the plaintiff travel to Portugal, subject to the minor child's educational requirements and extra-curricular activities.

4.2 Indirect contact in the form of telephone calls, emails, texts, Skype, WhatsApp, and FaceTime on a regular basis.

4.3 Any further or additional contact by agreement in writing between the parties.

5. The costs of the minor child's flights and travels between South Africa and Portugal, which are to take place bi-annually, during the European winter school holiday period and during mid-year, are to be paid by the defendant.

6. The plaintiff's obligations to contribute towards the minor child's maintenance costs and expenses, as provided for in the order of the Maintenance Court on 21 August 2018 under case number 698/2018/201, shall remain in place, save that the plaintiff shall, on relocation of the minor child to Portugal, pay school fees equivalent to the fees charged by Al Falaah College, which amounts will be payable monthly in advance into the defendant's nominated bank account.

7. On relocation of the minor child to Portugal, and within a period of no longer than four (4) months after arrival in that country, the defendant is directed to apply to a court with competent jurisdiction or an administrative authority (where relevant) for a mirror order to be granted on the same terms as provided for in this order.

8. The consent of the plaintiff, as required by section 18(3)*(c)*(iv) of the Children's Act 38 of 2005, for the submission of an application for a South African passport, and the issuing thereof in respect of the minor child, who has South African identity number 1[….], be and is hereby dispensed with.

9. The requirement of the plaintiff's signature in the application for a South African passport for the minor child, being the certificate of consent by both parents or guardians of a minor, is dispensed with.

10. The Director General: Home Affairs is authorised and directed to accept the application for a South African passport for the minor child at the instance of the defendant, without the plaintiff being present when the application for a passport is submitted, subject to compliance with the remaining provisions of the South African Passports and Travel Documents Act 4 of 1994, and the regulations thereto, without the signature in the certificate of consent of the plaintiff.

11. The defendant shall be entitled to retain the minor child's South African passport issued in terms of this order, and in the event of the plaintiff requiring the passport in order to travel overseas with the minor child, he is directed to return the minor child's passport to the defendant as soon as the minor child returns to South Africa.

12. The plaintiff is directed to sign all and any documents required for the issuing of a visa for the minor child to enter into and reside in Portugal, such documents to be signed by the plaintiff before a commissioner of oaths within a period of five (5) days from the date of written request from the defendant.

13. In the event of the plaintiff failing to depose to the parental consent affidavit required for a visa for the minor child, his consent is dispensed with and the applicant is entitled to apply to the Portuguese authorities without the consent of the plaintiff.

14. The plaintiff is directed to pay the defendant's costs in the proceedings under case numbers D376/2020 and D1062/2021, including all reserved costs on 5 November 2020, 6 March 2020, 17 November 2022, 14 June 2023, and 5 August 2024. Such costs shall be assessed on scale B.

15. The plaintiff is directed to pay all of the reasonable costs incurred by the defendant for the employment of her expert witness, clinical psychologist Mr Terence Dowdall, including his qualifying fees, the costs of his attendance at trial, and his traveling and accommodation costs.

JUDGMENT

CHETTY J

[1] This matter requires the determination as to whether the custodial parent is permitted to relocate with the minor child to a foreign jurisdiction, in this case Portugal, in circumstances where the non-custodial parent, being the father, refuses to grant his consent to such relocation. The plaintiff and defendant were married to each other on 22 March 2013. During the course of their marriage, a boy, H[…] W[…] E[…] E[…] S[…] ('H'), was born on 5 December 2013. He is now 11 years old and attends a school in Durban.

[2] After the birth of H, the parties began to experience problems in their marriage. The breakdown was, in part, attributable to differences in personalities and worldviews, specifically the defendant (to whom I will refer as 'N') being a well-educated, assertive woman of the Islamic faith, while her husband, the plaintiff (to whom I will refer to as 'W'), who is 21 years her senior, is more traditional and more conservative in his outlook, and in particular his strict adherence to the Islamic faith. These differing perspectives contributed to the ongoing conflict, particularly regarding parenting choices and the upbringing of H. During July 2017, N vacated the matrimonial home with H and moved in with her parents. The parties were subsequently divorced in 2018, pursuant to which an agreement was reached. In terms of the agreement, H's primary residence was to be at N's parents' home, and W would have generous contact with H. At the time of hearing the matter, W's contact included overnight stays with H. His contact amounted to approximately eight nights per month, which included weekend stays from Friday afternoons until Sunday afternoons.

[3] Invariably, the separation of the parties resulted in a differing of opinions regarding what would be in the best interests of their child, including the school he was to attend. The strain of the Covid-19 pandemic further exacerbated tensions and disrupted existing parenting arrangements, resulting in a flurry of litigation in 2020, with H being subjected to various educational and psychological assessments. In January

2020, W instituted proceedings for formalised contact with H. In response, N instituted a counterclaim for an order permitting her to relocate with H to Turkey.

[4] In November 2020, Tsautse AJ granted an order declaring both parties to be co-holders of full parental responsibilities of H. The order further provided that W shall be entitled to exercise contact with H on alternate weekends, commencing from Friday afternoons to Monday mornings before school, as well as alternate Wednesdays from after school until Thursday mornings before school. The July and December school holidays, along with significant dates such as religious holidays, festivals, and H's birthday, are to be shared equitably between the parties. Additionally, in circumstances where N would be away from Durban for business or any other purpose, she is to ensure that W is entitled to have access to H for visitation purposes.

[5] In February 2021, W instituted proceedings against N, in which he sought an order that the primary residence of H be awarded to him, subject to N's reasonable rights of contact. In October 2022, N delivered a declaration under the earlier proceedings instituted by W, in which she now sought an order entitling her to relocate with H to Portugal, as opposed to her earlier intention to relocate to Turkey. Despite contentions of irregular proceedings pertaining to the declaration, in terms of the judicial case management of the matter, it was eventually agreed that the action under case number D376/2020 would be consolidated and heard jointly with the action under case number D1062/2021. Accordingly, the issues relating to the primary residence of H and the proposed relocation to Portugal would be determined simultaneously.

[6] The proceedings were initially set down in April 2024 but were adjourned as W needed to instruct new counsel. At the time of adjournment, the court directed the Office of the Family Advocate to conduct an urgent enquiry and submit a report. Additionally, the court issued an order prohibiting W from subjecting H to any further tests and assessments by experts, including by psychologists and social workers. W was further directed to pay the costs in respect of the adjournment. In light of both the primary residence and the relocation disputes being before the court, the matter could only be heard in March 2025, as the anticipated duration for the hearing was estimated by the parties to be eight court days.

[7] At the commencement of the trial on 10 March 2025, Mr *Stokes* SC, who appeared on behalf of the W, informed the court that W no longer wished to pursue his claim for primary residence and sought leave to withdraw his claim. N did not oppose the withdrawal but reserved her rights to address the issue of costs to be argued at the conclusion of the matter. I granted leave for W's claim to be withdrawn under case number D1062/2021.

[8] It is significant to point out that while there is no strict onus on either parent in relocation disputes involving minor children, the court is nonetheless required to conduct a thorough enquiry to determine whether the decision by the custodial parent to relocate is both reasonable and *bona fide*, and ultimately whether it serves in the best interests of the child. In undertaking this enquiry, the court functions as the upper guardian of minors, and the discretion exercised in this context is broad and is not confined to a narrow interpretation.[1] In *Jackson v Jackson*,[2] the majority judgment stressed that 'each case must be decided on its own particular facts' and that past decisions serve merely as useful guidelines, rather than binding precedent. The court in *Jackson*[3] added further that because the interests of minor children are involved, litigation in relocation disputes amounted to a 'judicial investigation' into what is in the best interests of the child.

[9] However, where one of the parents elects not to testify, as in this case, the court's ability to fully ascertain what is in the best interests of the child in a relocation dispute is significantly constrained. The court is then left with the evidence of only one parent, and unless the evidence presented is so unconvincing and fails to meet the requirements of reasonableness and bona fides, the relief sought ought to be granted.

[10] The material background facts in this matter are largely common cause. W elected not to testify, nor to lead any evidence of the expert witnesses in respect of whom various applications were brought to ensure that N made H available for these specific assessments. In addition, at the pre-trial conference, W indicated that he

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[1] *LW v DB* 2020 (1) SA 169 (GJ) para 5.
[2] *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 318G-H para 2.
[3] Ibid at 307G-H para 5. I point out that while this view is advanced in the minority judgment, it is not suggested by the majority that this approach is incorrect.

would be relying on certain expert witnesses' testimonies. However, at the trial, all of this dissipated. This, despite a joint minute having been signed by the experts of both parties, setting out their agreement on the relocation of H.[4] In light of the position adopted by W not to lead any evidence, none of the expert reports which were prepared in substantiation of his case were relied upon nor admitted into evidence. As stated earlier, this approach renders the enquiry all the more difficult. For the same reason, the joint minute by two child therapists was excluded. The court was therefor left with the evidence of N and her expert witness, Mr T Dowdall ('Mr Dowdall'). Their evidence was disputed by W. The issue is thus whether N's evidence, as a whole, satisfies the threshold for relocation.

[11] N testified in support of her claim to relocate to Portugal with H. She was subjected to strenuous cross-examination regarding her reasons for wanting to relocate, which eventually revealed that her primary motivation was a deep-seated and desperate need to be with her elderly parents, who had decided to relocate to Portugal. N's evidence provided a useful backdrop against which her decision to relocate can be assessed to determine whether her decision is reasonable and *bona fide*. Much of her evidence is also contained in the report of Mr Dowdall, from which I draw to the extent that his report was admitted into evidence and the factual background of the parties as contained therein was not subjected to any challenge from W.

[12] N married AV shortly after her matriculation in November 1999, at the age of 19. She gave birth to her daughter, A, in April 2001. Her marriage became strained over time, in part because of the pressures of her religion and the more conservative views held by her husband. N and AV divorced in 2005. It bears noting that during the period of her first marriage, N attended the then University of Natal, where she studied towards a Bachelor of Computer Science, graduating with distinction. She succeeded in funding her tuition through scholarships. After graduating, N worked for Telkom, after which she relocated to Johannesburg. She later returned to university and, in 2004,

[4] It is worth pointing out that at a pretrial conference held in February 2023, attended by counsel and the attorneys of the respective parties, the following was stated: 'Subject to the delivery of a report by Mr Clayton and the filling of a joint minute by Mr Claton and Mr Dowdall, the plaintiff agreed with his recordal'.

obtained a Masters in Electrical Engineering from the University of the Witwatersrand, majoring in telecommunications. Subsequently, N joined MTN, who offered her an opportunity for relocation to Dubai. However, N stated that she did not consider Dubai to be in the best interests of her daughter, who required remedial education. As a result, she opted to take a retrenchment package and returned to her parents' travel agency in Durban, where A attended a remedial school. Her daughter then chose to return to Johannesburg to live with her father, and later followed him to Dubai where he lived. In respect of granting consent for her daughter to join her father in Dubai, N said it was a difficult decision for her but she allowed her to join her father. N described her present relationship with A, who is now 24 years old and who works in Rome, as 'fantastic'.

[13] At the time of the trial, N was employed as an Operations Manager for a software development company, as well as a consultant for Rain, an IT company, with her work being primarily conducted online.

[14] The report of Mr Dowdall sketched a picture of W, who was born in Lebanon into an extended family with very strong religious foundations, with his father being a Muslim sheik. W worked and lived in Saudi Arabia and the United States before settling in South Africa in 1990, where he established himself as a successful businessman in importing truck tyres and also became involved in humanitarian work, starting an international Islamic relief organisation. In 2014, W decided to withdraw from his business life, which was left to his sons to manage. He concentrated his efforts on his religious and humanitarian work, becoming a director of the Muslim World League, on whose behalf he travelled extensively in Africa and the Middle East. Mr Dowdall's report also captured the details of W's four previous marriages, prior to his marriage to N. He has eight children from those relationships. He met N during the period when she was encountering problems in her marriage to AV. W was a very close friend of N's father, who enlisted W's assistance to offer N religious counselling. Despite their 21-year age difference, N and W married in March 2013 and H was born in December 2013. Mr Dowdall's report suggested that H's birth caused consternation between the parties, as W felt that he had been 'tricked', as he had not planned on having a child so soon. Notwithstanding this, W is recorded as being a good father and being present throughout H's milestones.

[15] After the birth of H, N felt the need to return to the working environment, where she interacted with other colleagues, which gave rise to some resentment on the part of W. The shift in dynamics contributed to the deterioration of their relationship, resulting in their separation in 2017. Mr Dowdall's report recorded a statement from N in which she explained that '[h]e needed a doormat and I didn't want to be one … he wanted me to be financially dependent on him so he could control me…'. She attributed her yearning to gain independence through her work and further studying as reasons for them growing apart. Conversely, W perceived N as being 'oppositional, defiant, and conniving', and found her temper difficult to manage, ultimately considering her to be disrespectful towards him.

[16] Following on the divorce of the parties in 2018, and in terms of an agreement, W undertook to pay maintenance of R8 000 per month, with an annual escalation of 10 per cent. Additionally, W is also responsible for the payment of H's school fees and medical aid. There is no dispute between the parties in this regard. N asserted that should she be permitted to relocate to Portugal, such maintenance arrangements should continue. According to N, based on her financial assessment of her needs and that of H in Portugal, the present arrangements would (if continued by W) be sufficient to cater for H's well-being. While separated, N travelled to Turkey in 2019 with A, her parents, her sister, and her sister's family, who were based in Belgium. H remained behind as W refused permission for the child to travel abroad. While in Turkey, N visited the Sabahattin Zaim University, where she was offered a scholarship to study a Master's degree in Islamic Finance and Economics. She subsequently began preparing her application for relocation to Istanbul with H around September 2020. This application was opposed by W.

[17] In hindsight, N testified (which is also consistent with the report of Mr Dowdall) that the motivation behind the application to relocate to Turkey was self-centred, based on improving her own academic qualifications and a more secure lifestyle. Additionally, she was further motivated by the prospects of being closer to her daughter, A, and her sister, both of whom are based in Europe. However, those plans changed, and this coincided with the closure of the family travel agency during the Covid-19 pandemic. With the passage of time and the continuing litigation between the parties, N

abandoned her plans to relocate to Turkey, partly because she was able to pursue online learning through institutions in Turkey. She later conceded that her application to relocate to Turkey was a retaliation to an application from W in which he sought more contact time with H.

[18] During her testimony, N was cross-examined on what distinguished her current application to relocate to Portugal from her previous application to relocate to Turkey. It was put to her that her application to relocate to Portugal is equally self-centred and in her best interests rather than that of H, and, furthermore, that it is a retaliation against the request by W for primary care of H. She denied these contentions and maintained that the move would be in her and H's best interests. In her application, she provided a host of factors in support of their relocation. These included the fact that her extended family, including her parents, are relocating to live permanently in Portugal, and that, if she is unable to relocate with H to Portugal, she will be isolated in South Africa, primarily because she and H have lived with her parents since the time of her separation from W in 2017. She further contended that the area to which her family intends to relocate, where they own property, is in a rural setting, and that her remote employment would not be impacted by the move, particularly as she is now in possession of a D3 visa, issued by the Portuguese authorities, known as a 'highly qualified activity visa'. These visas are colloquially referred to as 'scarce skills visas'. In terms of a joint statement by the parties pertaining to N's visa status, it is agreed that N has been issued with a residence permit, valid for two years, and which can be renewed for subsequent periods of three years. She is further entitled to apply for a dependent's visa for H from the Portuguese authorities, which entitles H to reside with her in Portugal.

[19] As N is currently employed as a telecommunications engineer with the software consulting company, TS Digital, it can therefore reasonably be assumed that N's earning potential will not be adversely affected in any way and she is 'financially comfortable' to take care of her and H's needs in Portugal. N expects that, if H is permitted to relocate to Portugal, W's maintenance of the child will adequately cater for their needs. Similarly, H will be placed on a medical plan to cater for any eventualities that may arise. In addition, N expects to retain a property which she owns in Durban, which she will let out for additional income.

[20] During the course of N's testimony (which was also confirmed by the report of Mr Dowdall), N believed that she is now more mature and has carefully thought through her decision to relocate to Portugal, in contrast to the almost hasty decision to leave for Turkey. In August 2022, N travelled to Portugal with her parents and believed that it would be a suitable environment for H to grow up, and for her to live with the support of extended family. N intends to relocate to the Silver Coast of Portugal, specifically to a town called Caldas da Rainha, a relatively short distance from the capital, Lisbon. Her present relocation application submitted in October 2022 stated that the reason she now wished to relocate is to keep intact her extended family support system. The primary reason advanced is that H will be safer and ensured of a more secure lifestyle with the benefits of being in a European country. She further explained that her parents have purchased and developed a smallholding in Caldas da Rainha, where they have built three free-standing units, to be occupied by herself (and H), her parents, and her sister, who will be relocating with her family to Portugal from Belgium, where they currently live. The development is to be completed by mid-2025. Additionally, the family also owns a beach flat in an area called Nazare, approximately 15km away from their housing estate. The plan is also for their younger brother, M, who currently resides in Johannesburg, to relocate to be with the family in Portugal.

[21] With regard to H's education, while N was in Portugal, she explored several educational options, including an international school and a school offering a Cambridge-based curriculum. Ultimately, she opted for a school in Caldas da Rainha, which is English-medium and maintains relatively small classes. All students are taught to speak Portuguese and the school has classes up to the local equivalent of Grade 12. If H relocates and is admitted to the school, he will have the opportunity to complete his schooling at Colegio Rainha. This school is particularly well-suited to H's needs, as it offers smaller classes that align with his learning requirements and provides additional support for children with learning and educational challenges. Furthermore, the school has access to English-speaking occupational therapists and educational psychologists, if necessary.

[22] In terms of the contact that H will have with W in the event of their relocation, N proposed that she will reside nine months of the year in Portugal and will bring H to South Africa for two months a year, during which time W will have unrestricted access and contact with H.[5] This arrangement, as I understood from Mr *Humphrey*, who appeared for N, would not be encumbered by any existing restrictions on W's contact with H, such as having to pick and drop him off at a particular time. The visits to Durban are intended to be in two separate block visits during the July and December school holidays. In addition, as W frequently travels abroad, N has undertaken to allow him unrestricted contact with H at any time throughout the year were he to visit Portugal.

[23] What emerged during the course of the testimony of N was that, despite presenting herself as a fiercely independent women, she became emotional at the prospect of being forced to choose between living with her elderly parents in Portugal and potentially having to relinquish her time with H, if the court were to refuse her application for relocation. She genuinely believed that H's best interests can be taken care of in Portugal, surrounded by the support of his grandparents and his mother's extended family. While she also highlighted the advantages of relocating to a safer environment for raising H, she conceded under cross-examination that crime is a world-wide phenomenon and no destination is crime free. The point which she attempted to make was that the crime rate in the area she wished to locate is comparatively lower. I, however, accept Mr *Stokes's* submission that the level of crime in our country has on many occasions been offered as an exaggerated reason for relocation and it has become somewhat clichéd.

[24] N further testified regarding the strained and acrimonious relationship between herself and W, which she believed has a detrimental impact on the well-being of H. She emphasised that the conflict between them remains constant, even where court orders have been secured to 'manage' the manner of their engagement around H. To this extent, the expert opinion of Mr Dowdall suggested that the ongoing tension between the parties and the best interests of H would be better served by the appointment of a parental co-ordinator, such as an attorney practising in the field of

[5] I initially understood the proposal from N to be three months. After the hearing, N's counsel clarified, at the court's request, that the proposal for contact, as set out in the draft order tendered, was for six weeks during the European summer vacation and 10 to 14 days during the winter vacation.

child and family law, who would be able to avoid the unnecessary resorting to litigation by the parties.

[25] The trial lasted seven days and saw W abandon his claim for primary residence, without explanation, on the first day and elect not to testify. N gave detailed evidence on every aspect of her intended relocation. The critical issue remains whether N's claim to relocate with H to be closer to her aging parents and to be supported by her extended family in Portugal outweighs W's right of access and personal contact with his son. It is true that through modern technology, live streaming reduces the level of personal anguish that a parent will endure when their young child has relocated to another part of the country or the world. However, it is never a substitute for the touch and feel of a human being, particularly one's child.

[26] N conceded under cross-examination that the standard of medical care, schooling, and sports opportunities offered currently to H in South Africa are not significantly any better than those which will be available to him in Portugal. It was further put to N that while H would have the companionship of his cousins in Portugal, such a relocation would entail him abandoning the close friendship he has developed with M, W's grandson, and the son of W's daughter, who resides in the same apartment block as W. Mr Dowdall, both in his testimony and in his report, confirmed the close bond shared between H and his cousin, M. The report also highlighted the closeness between H and his father, W, as well as H's relationship with his uncles and their children. However, after having administered the Bene-Anthony Family Relations test on H, Mr Dowdall concluded that H assigned to N more positive traits than to his father, W. This, it was suggested, would not be surprising seeing that N is H's primary attachment figure. Ultimately, Mr Dowdall testified and reported that H, on being questioned, said that he was close to both his parents, without preferring one over the other. Mr Dowdall in his report stated that N and W are 'good enough parents', with N attending to H's emotional development and all practical details of his life. Mr Dowdall described her at the parent more 'attuned' to H's needs. At the same time, it was noted that even the slightest disagreement between the parents frequently escalated into heated arguments, to which H is often exposed.

[27] The reports by the Office of the Family Advocate were also placed before the court. However, none of those responsible for preparing these reports were available to testify. In relation to N's application to relocate to Turkey with H, the Office of the Family Advocate concluded in August 2020 that N's reasons for doing so 'were neither compelling nor substantial and focus on her needs rather than the needs of the child'. It was further concluded that H has a broad support system in South Africa, whereas the support system in Turkey appeared to be limited. Moreover, given that H is a child with special needs, it was considered important that any relocation would disrupt his established routine. In addition, it was found that he shared a close bond with his father, who was described as an 'involved parent', and H was accustomed to the routine of frequent and quality contact with him. Consequently, it was recommended that both parties remain co-holders of parental responsibilities in respect of H, who was to reside primarily with the mother. The Family Advocate determined that it would not be in the interests of H to relocate to Turkey.

[28] In relation to the application for relocation to Portugal, the Office of the Family Advocate, in its report of July 2024, again determined that it would not be in the best interests of H to relocate. The report found that the reasons advanced by N for the relocation were neither compelling nor substantial, and there were no indications of an overt or direct benefit for H. As to N's concerns of the recent spate of rioting in KwaZulu-Natal and the impact that this could have on H, the Office of the Family Advocate found this reasoning unconvincing, as there is an element of risk wherever one may choose to relocate.

[29] The report further emphasised that H was at an age where he required the involvement of both parents and regular and frequent contact in order to establish bonds with both parents. As with the earlier report, the Family Advocate concluded that H shares a close bond with his father and is accustomed to the frequency of contact with him. The report further concluded that H would have to 'adjust to caregiving arrangements in Portugal, in a country which he has never visited before'. It was further concluded that H has 'a broad support system, biological and psychological ties that are remaining in South Africa'. The support system in Portugal appeared to be 'limited', and 'removing the child from the current environment will not serve in his best interest and will result in unnecessary disruption in H's current routine

and lifestyle'. While I accept that any relocation will inevitably involve some level of disruption to a child's accustomed routine, this alone is not the test which the Supreme Court of Appeal has set out in order to determine whether the relocation is in the best interests of the child. I will return to this test later on. The report further recorded 'the practical difficulty an expense of a child having contact with a parent'. However, I find this conclusion difficult to accept, particularly in light of N's undertaking to ensure that while H is in Portugal, he will have regular contact with W through video contact, telephone communication, and extended access during the July and December holidays. There has been no thread of evidence placed before me to suggest that N has shown any disregard for complying with court orders, and in the absence thereof, her evidence must be accepted. For the reasons outlined above, I am not persuaded by the reasoning as set out in the report of the Office of the Family Advocate.

[30] Although W elected not to testify, the basis of his opposition can be ascertained from the pleadings. W contended that N has attempted to undermine the strong emotional and psychological bond between him and H. W further accused N of 'engineer[ing] the relocation of the minor child' with her to foreign countries in order to make it impossible for H to enjoy 'ongoing and beneficial contact' with him. He further accused N of being emotionally and psychologically unstable, a claim he based solely on N changing her decision to relocate, initially to Turkey and now to Portugal. Despite these allegations, I could not find any sufficient basis to suggest that her application to relocate was influenced by malicious intentions directed at 'punishing' W and depriving him of his right of contact with H.

[31] The position of W regarding N and H's proposed relocation is made clear in the pleadings. He is opposed to N relocating with H to 'either Turkey, Portugal or otherwise'. W maintained that, as long as he withholds his consent, N is obligated to remain within the jurisdiction of the court, while continuing to fulfil her role as primary caregiver, a role from which W has now withdrawn any responsibility. W further ascribed N's decision to relocate to the influence of her family, while placing H's interests as secondary to hers. These views are largely borne out in the factual descriptions recorded in the report of Mr Dowdall, which were not challenged in cross-examination.

[32] Mr Dowdall, a qualified clinical psychologist and former Head of Department of Clinical Psychology at the University of Cape Town ('UCT'), and the Director of the Child Guidance Clinic at UCT, was called as an expert witness for N. His academic credentials and extensive professional experience, particularly in the domain of child psychology and, more specifically, in providing expert evidence in child relocation disputes, were not called into question. However, counsel for W sought to undermine many of the conclusions reached in his report on the basis that these extended beyond the course and scope of his expertise and were not the result of the application of any scientific or psychological interpretative assessment. Mr Dowdall was accused of usurping the function of the court in making a determination that N's actions in electing to relocate were *bona fide* and reasonable. I am of the view that this criticism of Mr Dowdall, with respect, was unfair and unwarranted. Mr Dowdall has over 30 years' experience in dealing with relocation issues and was at pains to point out that he consulted extensively with both parties and their respective family members. It is fair to point out that the only 'aberration' would be Mr Dowdall's 'updated report' done in February 2025, in which he recorded a telephonic interview with H, without adopting a 'belts and braces approach' of alerting W to the intended call, or ensuring that H was at a neutral venue when the interview was carried out to avoid the possibility of him being unduly influenced by N when responding to questions. I believe that the criticism in respect of this interview is valid and accordingly do not take into account anything contained in that report. As for the main report, I am satisfied that it provides a useful background to the parties' approaches toward each other, their respective approaches on the issue of relocation, and what they consider to be in the best interests of H.

[33] It was further contended by counsel for W that the relocation application was motivated by the need to 'spite' W, following his application from primary care (which he eventually withdrew). Upon consideration of the evidence, I find no support for this contention. N admitted to not having a good relationship with W and made no pretence to shy away from their problems and her 'inflexibility' in respect of arrangements as to when H may be picked up and dropped off. While Mr Dowdall's report was also critical of N's behaviour, she was accused of 'gatekeeping', again a reference to her requiring strict adherence to the terms of the court orders. This assertion is further fuelled by N's decision that when she is away from Durban for whatever reason, H is left in the care of her parents, rather than in W's care. She contended, according to Mr Dowdall's

report, that she is under no obligation to leave H in W's care, as this is not stipulated in any of the court orders.

[34] Mr Dowdall's report repeatedly highlighted the propensity for seemingly minor issues to escalate into serious conflict between the parties. The point made by Mr Dowdall is that, if N's application for relocation were refused, compelling her to remain in South Africa away from her parents, this would likely have a disastrous effect on the already fraught co-parenting dynamic between herself and W, as she would no doubt want to seek retribution against him for opposing her decision. It is not in dispute that the parties have been engaged in constant litigation since their separation and have turned to the courts to resolve co-parenting disputes that they have been unable to resolve independently. This, in turn, as captured in Mr Dowdall's report, has had a negative impact on H's academic performance. The environment is described by one of the therapists as 'toxic' and an 'unhealthy environment'. It is for this reason that Mr Dowdall concluded that

'we have two parents who independently are loving to H and concerned about him and within their own spheres are capable parents. However, they have never been able to co-parent in a way that is independent of their irritation and resentments of each other and co-parenting has become the arena in which they continue their conflict with each other. All this child wants and needs is his parents (both of whom he loves) to be tolerant, decent and supportive to each other.'

Mr Dowdall suggested that it would be 'wishful thinking' to assume that their relationship will improve if N is directed to remain behind in South Africa.

[35] I now turn to the legal principles, distilled from the case law, which apply in child relocation disputes. The principles for determining relocation disputes involving minor children have now been clearly distilled in cases by the Supreme Court of Appeal, including *Jackson v Jackson*,[6] where Scott JA, writing for the majority, stated the following:

'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

[6] *Jackson v Jackson* 2002 (2) SA 303 (SCA) (*Jackson*) at 318E-I para 2.

reasonable. 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 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 for emphasis.)

[36] It bears noting that in *Jackson,* a father of two young children sought to relocate to Australia with them. In terms of the divorce order, the father was the custodian or primary caregiver of the minor children. Despite this, the Supreme Court of Appeal agreed with the full court of the KwaZulu-Natal Division of the High Court that the evidence showed that the children spent equal amounts of time with both parents and were indeed more closely attached to their mother. The Supreme Court of Appeal commented that there was no 'real separation between mother and children', differing from cases where access to the non-custodian parents is limited to alternate weekends.[7] In contrast, in the present matter, H spends approximately eight nights per month with W, and the remainder of the month is spent with N and his maternal grandparents.

[37] Following the decision in *Jackson*, the Supreme Court of Appeal in *F v F*[8] focused more acutely on the role of women, who almost invariably occupy the position as the primary caregiver. The court also highlighted the disproportionate impact that a refusal to grant a relocation application may have on women, particularly in the context of societal expectations and norms. Maya JA, writing for a unanimous court, made the following observations, which resonate with the stance of N in the present matter, whom I described earlier as an individual who is highly intelligent, firmly rooted in her

[7] Ibid at 321B-C para 10.
[8] *F v F* 2006 (3) SA 42 (SCA) (*F v F*).

faith, fiercely independent, and deeply committed to ensuring the best interests of her child.

[38] In determining whether a proposed relocation is in the child's best interests, '… the child's wishes in appropriate cases. It is an unfortunate reality of marital breakdown that the former spouses must go their separate ways and reconstitute their lives in a manner that each chooses alone. Maintaining cordial relations, remaining in the same geographical area and raising their children together whilst rebuilding their lives will, in many cases, not be possible. Our Courts have always recognised and will not lightly interfere with the right of a parent who has properly been awarded custody to choose in a reasonable manner how to order his or her life. Thus, for example, in *Bailey v Bailey*, the Court, in dealing with an application by a custodian parent for leave to take her children with her to England on a permanent basis, quoted - with approval - the following extract from the judgment of Miller J in *Du Preez v Du Preez*:

> "[T]his is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside; indeed, the Court takes upon itself a grave responsibility if it decides to override the custodian parent's decision as to what is best in the interests of his child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian parent's decision and the emotions or impulses which have contributed to it."

The reason for this deference is explained in the minority judgment of Cloete AJA in the *Jackson* case as follows:

> "The fact that a decision has been made by the custodian parent does not give rise to some sort of rebuttable presumption that such decision is correct. The reason why a Court is reluctant to interfere with the decisions of a custodian parent is not only because the custodian parent may, as a matter of fact, be in a better position than the non-custodian parent in some cases to evaluate what is in the best interests of a child but, more importantly, because the parent who bears the primary responsibility of bringing up the child should as far as possible be left to do just that. It is, however, a constitutional imperative that the interests of children remain paramount. That is the "central and constant consideration".'"[9] (Footnotes omitted.)

[39] Counsel for N submitted that the opposition by W to her relocation was intended to 'shackle' N to the jurisdiction of the court, and to thwart her movement to any other

[9] *F v F* para 10.

destination, while she remains the primary caregiver of H. If she were prevented from relocating with H, N stated that she would remain with him in Durban. Mr Dowdall opines that N would then remain 'in a kind of service capacity to her ex-spouse so that he can maintain a certain frequency of contact'. At the same time, the non-custodial parent (W) is not subjected to these limitations or indeed the onerous duty of having to raise H, and constantly being available for his needs.

[40] This disproportionate 'duty' received attention of the court in *F v F*,[10] where the following was stated:

'[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. This being so, I cannot agree with the views expressed by the Full Court that "the impact on S of the appellant's feelings of resentment and disappointment at being tied to South Africa, or the extent to which her own desires and wishes are intertwined with those of S" did not deserve "any attention" and that "[i]n arriving at a just decision [a Court] cannot be held hostage to the feelings of aggrieved litigants".

[12] It is also important that Courts be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts - who have no reciprocal legal obligation to maintain contact with the child and may relocate at will - may, and often does, indirectly constitute unfair gender discrimination. Despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender-based. It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce. The refusal of relocation applications therefore has a potentially disproportionate impact on women, restricting their mobility and subverting their interests and the personal choices that they make to those of their children and former spouses. As was pointed out by Gaudron J in a minority judgment in *U v U*,[11] the leading Australian case on relocation:

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[10] *F v F* paras 11-12.
[11] *U v U* [2002] HCA 36 para 36.

> "[I]t must be accepted that, regrettably, stereotypical views as to the proper role of a mother are still pervasive and render the question whether a mother would prefer to move to another state or country or to maintain a close bond with her child one that will, almost inevitably, disadvantage her forensically. A mother who opts for relocation in preference to maintaining a close bond with her child runs the risk that she will be seen as selfishly preferring her own interests to those of her child; a mother who opts to stay with her child runs the risk of having her reasons for relocating not treated with the seriousness they deserve."'

[41] The decision of N to relocate to Portugal was criticised as being reactionary and a retaliatory stance in light of W's application for increased contact with H, and later, his application seeking primary care. N's grounds for relocation, as set out in her pleadings, were essentially dismantled under cross-examination, to the extent where the only factor remaining which formed the primary basis of her relocation, was the need to be with her elderly parents, who had decided to immigrate to Portugal. Added to this was the fact that she would be joined by her sister and her family who had decided to emigrate from Belgium to Portugal.

[42] It was submitted by counsel on behalf of W that the relocation to Portugal offers neither N nor H a lifestyle or opportunities for development better than those they would receive in South Africa. H currently attends a private school and remains on a private medical aid scheme, both paid for by W. On the other hand, a relocation to Portugal would see H attending a public, English medium school, and utilising public health facilities via N's social security. Accordingly, it was submitted that the primary reason advanced by N was a factor that would benefit her alone and would not offer any benefit to H. Furthermore, as N would still remain gainfully employed as a software engineer with her present company, there are no career or financial benefits for her arising from the move. On this basis, it was contended that the factors which informed Mr Dowdall's conclusion that relocation would be in the best interests of H are undermined and should not be relied upon.

[43] In light of the evidence, the central issue which emerged is whether N's sole reason advanced for relocating, namely wanting to be with and live with her parents,

is sufficient to meet the threshold of being *bona fide* and reasonable. Maya JA set out the test in the following manner in *F v F*:[12]

'While attaching appropriate weight to the custodian parent's interests, Courts must, however, guard against "too ready an assumption that the [custodian's] proposals are necessarily compatible with the child's welfare". The reasonableness of the custodian's decision to relocate, the practical and other considerations on which such decision is based, the extent to which the custodian has engaged with and properly thought through the real advantages and disadvantages to the child of the proposed move are all aspects that must be carefully scrutinised by the Court in determining whether or not the proposed move is indeed in the best interests of the child.' (My emphasis and footnote omitted.)

[44] The above extract makes is clear that while the approach of our courts generally favours a relocation application where the custodial parent's decision is shown to be *bona fide* and reasonable, this is not because of the so-called rights of the custodial parent, or the existence of any presumption in their favour. Instead, it is because it will usually not be in the interests of the child to relocate if that decision is not reasonable and *bona fide.* Notwithstanding the strong sentiments expressed in *F v F* affirming the freedom of movement of a custodial parent, in bears noting that the court ultimately dismissed the mother's appeal seeking the court's consent to relocate. While the Supreme Court of Appeal found that the appellant's decision to relocate was undertaken honestly and in good faith, despite a 'genuine motivation', it nonetheless found that her decision was 'not as well-researched and investigated as they should have been'.[13] There was a lack of a structured plan for relocation, with plans constantly changing, and 'too many imponderables' to enable the court to assess the likely effect of the move on the minor child.[14]

[45] In contrast, in the present matter, N, as the custodial parent, has set out in detail her investigation into appropriate schooling for H, his medical aid provision, her employment status, and her financial well-being to enable her to support herself and her child, as well as the important factor of living with her extended family, most important of which are her parents, with whom she and H have been living since her separation from W in 2017. I am satisfied that the plans for relocation are not

[12] *F v F* para 13.
[13] Ibid para 20
[14] Ibid para 21.

reactionary or retaliatory in nature, nor do they reflect an impulsive decision made in response to actions by W. On the contrary, they have been carefully considered and preceded by a reconnaissance trip to Portugal undertaken by N. As such, the relocation plan does not suffer from the 'imponderables' identified by the court in *F v F*.[15]

[46] The report of Mr Dowdall emphasised that the interests of H could not be viewed in isolation from those of the custodial parent, N, seeking relocation, who he described as the parent most attuned to the full range of the child's needs, and an 'active primary parent' of H responsible for nurturing the child, who was found to be gentle, well-mannered, and confident. In the event that N was compelled to remain in the jurisdiction of the court, Mr Dowdall stated that she would be isolated and more stressed without the support of her parents, who have always backed her up. Her already negative attitude towards W will only be aggravated, and she would see in him the source of her frustrations, obstructing her from leading the life she envisaged for herself and H. He would be essentially blamed for any misfortune that could befall N and H if they were to remain, most prominently any act of vandalism or crime that they may experience. To that end, the best interests of the child are intertwined with those of his mother. If N is stressed or unhappy, this would inevitably have a ripple effect on H's emotional well-being. This was alluded to by Satchwell J in *LW v DB,*[16] where reference is made to the fact that although the best interests of the child are paramount, they must be considered in the broader context. The court made the following observation:[17]

'As was pointed out by Kirby J in the decision of the Australian High Court in *U v U* [2002] HCA 36, although the best interests of the child are to be treated as paramount, "They are not to be elevated to the sole factor for consideration. The economic, cultural and psychological welfare of the parents is also to be considered, because they are human beings and citizens too and because it is accepted that their welfare impacts upon the welfare of the child. The general quality of life of both the parents and the child is relevant"...'

[15] Ibid.
[16] *LW v DB* 2020 (1) SA 169 (GJ) (*LW v DB*).
[17] Ibid para 63.

[47] Counsel for W relied on *Hinds v Hinds,*[18] in which a Full Court of this division dismissed an appeal by the mother of a young boy who wished to relocate with him to Zimbabwe following her divorce. At the time when the mother's application to relocate was dismissed by the high court, the child was barely five years old. The mother sought to relocate, as she intended to marry a resident of Zimbabwe. Both parents, as in the present case, were devoted to their child. The Office of the Family Advocate concluded that the child should not be relocated and the primary reason for the relocation was that the mother wanted to pursue a relationship with a gentleman and taking her son along 'was the inevitable consequence'.[19]

[48] The high court found that the decision to relocate was made without adequate prior consideration of the needs of, or the impact of such a move on the child, and without prior consultation with the father. The full court could find no misdirection in the decision of the high court and accordingly dismissed the appeal. Olsen J, while agreeing with the order, disagreed with reasoning of the majority (per Van Zyl and Koen JJ) and placed considerable stow on the effect that the refusal to relocate would have on the appellant's right to freedom of movement.[20] In doing so, he aligned himself with the views expressed by Maya JA in *F v F* on the differing treatment accorded to custodial and non-custodial parents. Koen J, in a separate judgment, (Van Zyl J concurring**)** disagreed with Olsen J and in particular his reliance on paragraphs 11-12 of *F v F*. Koen J cautioned against an 'unqualified acceptance and application in all matters which might restrict the freedom of custodian parents'.[21] He remarked that the 'reliance on the sentiments expressed in *F v F* would not be justified' and should not be a consideration influencing the outcome of the application.[22]

[49] The facts in *Hinds* do not provide a detailed history of the parenting contributions by both parties and therefore it is difficult to discern the basis for Koen J to have concluded that '[t]he notion that non-custodian fathers are able to relocate at will because they have no reciprocal legal obligation to maintain contact, is with respect a cynical approach unless the facts of a particular case justify such a

[18] *Hinds v Hinds* [2016] ZAKZPHC 92 (*Hinds*).
[19] Ibid para 24.
[20] Ibid para 55.
[21] Ibid para 65.
[22] Ibid para 66.

conclusion'.[23] I do not interpret *F v F,* as a whole, to hold that as a custodial parent's rights to dignity, privacy, and freedom of movement are impacted, such a parent's rights must always trump that of the non-custodial parent. Maya JA notes that the impact on the custodial parent is not totally irrelevant:[24]

'What is evident from both *Jackson* and the cases which preceded it is that children's interests are more often than not intertwined with those of their caregivers and that Courts must thus properly consider the impact on the custodian parent of a refusal to remove a child insofar as such refusal may have an adverse effect on the custodian parent and in turn the child.'

[50] Koen J's views in *Hinds*, in my respectful view, appear to be at variance with the dicta in *F v F.*[25] The facts in *Hinds* are distinguishable from the present case, and to that extent, I do not consider Koen J's judgment to be binding on me in this case. I, however, respectfully disagree with the notion that just as non-custodial parents have to conceal their disappointment when they lose daily contact with their child, so too should the custodial parent accept the loss of life enhancing opportunities from emigration, as the best interests of the child essentially means the maintaining of regular contact with his or her non-custodian parent. This approach, in my respectful view, is primarily focused on what serves the interests of the parents, be they custodial or non-custodial, rather than prioritising the best interests of the minor child. I am also of the view that it is altogether too simplistic an approach to suggest that custodial parents seeking to relocate (who are disproportionately women)[26] would seek to hold

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[23] Ibid para 71.
[24] *F v F* para 17.
[25] See *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC) para 21 where the Constitutional Court held:
'[R]espect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution. Why intrinsic? Because without precedent, certainty, predictability and coherence would dissipate. The courts would operate without map or navigation, vulnerable to whim and fancy. Law would not rule.' (Footnotes omitted.)
[26] See *LW v DB* paras 78-79:
'[78] Further, one should not lose sight of the fact that primary caregivers or custodial parents are most frequently the mothers. It is perhaps a notorious fact that —

> "mothers, as matter of fact, bear more responsibilities for child-rearing in our society than do fathers. This statement is, of course, a generalisation. There will, doubtless be particular instances where fathers bear more responsibilities than mothers for the care of children. In addition, there will also be many cases where a natural mother is not the primary care giver, but some other woman fulfils that role, whether she be the grandmother, stepmother, sister, or aunt of the child concerned." [Goldstone J in *Hugo* supra [77] at 22E – G.]

[79] This means that the aforesaid restriction on mobility and abrogation of "freedom of movement" would impact more inequitably upon women than upon men. That may not be the intention behind an approach which requires primary caregivers or custodial parents to remain resident where the other parent chooses to be resident. But discrimination which is unintended or unforeseen or even made in

the courts effectively to ransom on the basis that if relocation is refused, their resultant unhappiness would undoubtedly rub off on the minor child, thereby militating against a refusal of such applications. As the report of Mr Dowdall indicates, these conclusions are the result of an extensive study.[27] Ultimately, as Scott JA cautioned in *Jackson*[28] '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'.

[51] In this matter, the court was presented with only N's version in support of her application to relocate to Portugal. I have not had the benefit of any evidence on behalf of W in opposition to that of N. The same applies to N's expert witness, Mr Dowdall, whose written report was handed in as an exhibit. I am satisfied that Mr Dowdall was not biased in his conclusions and he provided cogent explanations for his recommendations. W's concern, as reflected in Mr Dowdall's report, is that H's relocation to Portugal would effectively sever the close relationship between him and his son, replacing regular in-person contact with virtual communication, except for a period of two months, during which he will have unrestricted access to and contact with H. It is also significant to point out that Mr Dowdall attached weight to H's childhood bonding period with W, which in his view, laid the foundations for a secure bond of attachment between the two. Even in the event of H relocating, according to Mr Dowdall, this attachment would endure. As I have already alluded, I do not believe that N will breach the terms of an order requiring her to bring H back to South Africa for visitation purposes with W.[29] Counsel for N informed the court that in order to demonstrate her commitment to comply with an order requiring her to return with H to South Africa twice a year, N undertakes to approach a Portuguese court or

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good faith is still not necessarily fair. I suggest that careful consideration need be given to applying the "best interests" principle in a manner which does not create adverse effects on a discriminatory basis — in this case gender discrimination.'

[27] Mr Dowdall's report at para 2.6.9 records the following:

'Since we are primarily concerned with the best interests of the child, however, does N's well-being really matter in this assessment? Yes, it does, since she is the primary attachment figure and primary caregiver of the child. Wallerstein's extensive 25-year follow-up study of children of divorce indicated that *"All our work shows the centrality of the well-functioning custodial parent-child relationship as the protective factor during the post-divorce years*" (Wallerstein and Tanke, 1996). To the extent that she is stressed or unhappy, there would be an inevitable knock-on effect in H's emotional life because of their closeness.'

[28] *Jackson* at 318H-I para 2.

[29] Mr Dowdall's report at para 3.9 states as follows '…even W has said that N obeys Court Orders "to the T" and I think that the best prediction of future behaviour is past performance'.

administrative authority for a mirror order to be granted, thereby making the terms of any order granted by this court binding on her while in Portugal.

[52] Mr Dowdall carefully weighed up the competing interests of the parties, having interviewed both sides, and was of the view that the scenario in which H's primary residence and care remains with N is the most preferable outcome, serving his best interests. After considering the evidence before me, and even to the extent that the primary motivation of N for wanting to relocate to Portugal is to be with her aging parents, I am satisfied that as a parent, the decision is properly thought through, rational, reasonable, and *bona fide*.

[53] As parents, both N and W are under a duty to ensure that they do not do anything that interferes with or impedes H's development and upbringing in a new country. He will no doubt experience the pain of moving away from his father and his paternal family. The separation of his parents, more than six years ago, would have in some measure prepared him for a degree of distance between his maternal and paternal families. As pointed out in *Van Rooyen v Van Rooyen*,[30] young children, who are the subject of relocation disputes, will have to become accustomed to living and attending school in a totally new environment, having to make new friends, and adjusting to new ways and a new culture. At the same time, H will have the care and support of his grandparents, a support base which he has become accustomed to. The distance between N and W will undoubtedly remove the trigger for conflict, a concern highlighted by Mr Dowdall in his report. Counsel for W described it as two parents who cannot seem to agree on how to raise their child. However one characterises it, their acrimony towards each other has had a ripple effect on H. With this source of confrontation out of the way, H's development into a teenager will be unhindered.[31]

[54] N is committed to ensuring that H will remain in contact with W via electronic communication, through FaceTime, Skype or WhatsApp, or any other means. She has

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[30] *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) (*Van Rooyen*) at 439E-G.

[31] In *Van Rooyen* at 440E-F, the court made the following comments pursuant to the granting of a relocation order in favour of the mother 'I would reiterate that I accept the mother's good faith and emphasise that it is her sacred duty to respect and foster the relationship between the children and their father'. The duty placed on N once the relocation to Portugal is completed will be no less.

also undertaken to ensure that H will be accessible to be visited by W in the event of him travelling abroad, through Portugal. This would have no impact on the requirement of N returning H for visits in South Africa with W twice a year, for 'block' contact. It is worth noting that while W will be deprived of exercising regular physical contact with H, the block contact and access to H, if he were to visit Portugal, in some measure, ameliorates the hardship occasioned by the granting of the relocation order.

[55] In light of my view that N be granted an order authorising the relocation of H with her to Portugal, I turn to the issue of costs. It is generally accepted that in relocation disputes, where the enquiry is essentially what is in the best interests of the child, no costs should be award. Counsel for W submitted that N's application for relocation be dismissed with costs. On the other hand, it was submitted on behalf of N that her application for relocation to Portugal, which arose in October 2022 in her declaration filed under case number D376/2020, should prevail, with costs. Her earlier application to relocate to Turkey, after opposition, morphed into the present application to relocate to Portugal. In addition, she further contended that W also be liable for the costs occasioned under case number D1062/2021, in which he instituted proceedings seeking primary residence of H. Both the respective proceedings were consolidated and set down together for hearing.

[56] It is common cause that the consolidated trial did not proceed on 15 April 2024 (when it was set down for five days), as W's counsel withdrew shortly before the matter could be heard. At the time of this adjournment, the court directed the Family Advocate to provide updated reports. It further granted an order preventing W from employing further experts for the purpose of conducting further assessments and specifically directed that H and N did not have to comply with any request to submit themselves for further assessments. It has been a feature of these proceedings that all measure of experts have been employed by both parties. A striking feature of the trial was that despite subjecting N and H to a barrage of assessments, W chose not to testify at the trial nor to call any of the host of experts whom he had engaged over the years. Even at the pre-trial conference, W indicated that he would be calling expert testimony in support of his case. It begs the question, in my respectful view, what exactly motivated W in pursuing this litigation, alternatively the basis for him or his witnesses not

testifying under oath? It was, after all, on this basis that two weeks were allocated for the trial. As matters turned out, a total of eight days were used.

[57] Although there is no strict onus in the conventional sense in child relocation disputes, it nonetheless requires evidence from both parties so that the court can exercise its judicial discretion in making an order that is fair and just. The failure by one parent to present any evidence in such proceedings has the potential to derail a just outcome. Their failure to participate might suggest an ulterior motive in launching proceedings or defending the proceedings launched by the other parent, especially where no explanation is proffered for this stance. The bar of curiosity goes higher, particularly as the central issue is the best interests of one's child.

[58] The dispute between the parties has dragged on for more than four years, despite it also being subjected to judicial case management. Delays were occasioned at various intervals, to either a change of counsel, engaging new experts, or additional days for trial. Most of these delays were attributed to W. Section 6(4)*(b)* of the Children's Act 38 of 2005 provides that in matters concerning the best interests of the child, delays in proceedings are to be avoided, and require expeditious finalisation.[32] On the issue of costs, in *F v F;*[33] the SCA held that where both parties, in pursuing their claims, acted *bona fide* in what each of them perceived to be in the best interests of their child, each party should bear his or her own costs of appeal. N has had to defend W's claim for primary residence of H, which he was granted leave to withdraw on the morning of the hearing. The stance of W, as I have explained earlier, was without explanation. It would have entailed unnecessary preparation by those representing N.

[59] I am of the view that litigation conducted in this manner cannot escape an order for costs or be shielded from consequences only because the matter relates to an order in the best interests of a child. On the contrary, if parents truly focused on an outcome in the best interests of the child, they would do whatever is required for an expeditious finalisation of the matter. W has not acted in accordance with those objectives. In respect of case number D1062/2021 in which W withdrew his application

[32] See also Olsen J's remarks in *Hinds* para 53 as to the fast-tracking of matters, including appeals, where the central issue relates to the best interests of the child.
[33] *F v F* para 27.

for primary residence, in the exercise of my discretion, I find that W is liable to pay N's costs.

[60] As regards the proceedings in case number D376/2020 in which N's claim to relocate with H arose from a counterclaim, she has been substantially successful and her position to exercise her choice as a parent, acting in the best interests of her child, and as an independent woman seeking to establish a better future for herself and her child, has been vindicated. Her offers of visitation to W were reasonable and accommodating. She did not approach the matter in an uncompromising manner, nor acted unreasonably. In the exercise of my discretion, taking into account the facts of the matter and the circumstances in which the litigation unfolded, the election by W not to testify, and not to rely on experts, the preparation of whose reports resulted in this matter having dragged on, I am of the view that a just outcome is for W to be liable for all costs incurred by N in advancing her counterclaim, including all costs reserved on 5 November 2020, 6 March 2020, 17 November 2022, 14 June 2023 and 5 August 2024.

[61] Counsel for N proposed the granting of various orders foreshadowed in a draft order, incorporating a provision for the appointment of a parenting co-ordinator to assist W and N in the exercise of their parental rights and responsibilities in regard to H. In reaching the conclusion that I have regarding the relocation of N and H to Portugal, I also considered that the resultant distance between the parties would reduce the level of acrimony and tension between them. The appointment of a parenting co-ordinator, although well-motivated by N's counsel, I find to be an unnecessary intrusion at this stage. The parents of H are obliged to act civilly towards each other, if only to ensure that H's development is not adversely affected. Their divorce confirms that they cannot live together, substantiated by the evidence over their frequent bickering. However, parenting and making decisions for one's child is not something which should be, with respect, 'out-sourced' to involve a parenting co-ordinator. Moreover, the appointment of a parenting co-ordinator was not an issue that was canvassed at any length in the pleadings or in evidence, other than Mr Dowdall favouring such an appointment. I am accordingly not disposed to granting any order in that regard.

[62] It was submitted on behalf of N that the costs in respect of H's bi-annual travels to South Africa should be shared equally between the parties. I do not agree. Where the relocation has been sought at the instance of N and the purpose of the visits is to ensure that H maintains contact with W as he grows up, I believe that N should bear these costs.[34] This is not an expense that relates to the upbringing of the child, which the parties are both liable to contribute towards. Visitation to and contact with W is a right accorded to him as a parent. He should not have to bear the burden of costs for an arrangement not of his making. Moreover, this relief was not contained in the pleadings but emerged in the draft order proposed on behalf of N, support for which is found in the recommendations of Dr Dowdall. N did not tender any evidence on this aspect, nor was W required to defend this relief on the pleadings. The granting of such relief would, on this ground alone, be unfair to W.

[63] Finally, it is fair to conclude by stating that although N has been substantially successful in obtaining an order permitting her relocation to Portugal with H, in reality there are no winners. H will no doubt experience the disruption of departing from the country of his birth into a new culture. The court is reasonably certain, having had the benefit of receiving evidence from his mother, that she will do everything necessary to ensure that he grows up in a secure and comforting environment. The visits to his father twice yearly will ensure that those bonds will not be broken. It is an unfortunate reality that parents, on separation after divorce, assume intractable positions and sometimes use their children as proxies to wage their own battles. I do not suggest this to be the case in this matter, although much time and expense was devoted to a dispute which could have been resolved by mediation, with both parents putting aside their own personal feuds in the best interests of their son.

[64] In the result, I make the following order:

1. The defendant is granted leave to remove the minor child, H[…] W[…] E[…] E[…] S[…], a boy born on 5 December 2013, permanently from the Republic of South Africa, in order to relocate to Portugal.
2. The plaintiff's consent for the minor child's permanent removal from the Republic

[34] This view accords with a cursory perusal of numerous decisions in which permission to remove the minor child is granted to the relocating parent.

of South Africa and his relocation to Portugal, as required by section 18(3)*(c)*(iii) of the Children's Act 38 of 2005, is hereby dispensed with.

3. The minor child is entitled to depart from the Republic of South Africa and re-enter the Republic of South Africa without the requirement of a parental consent letter from the plaintiff, as provided for in regulation 6(12B) of the Immigration Regulations, 2014 to the Immigration Act 13 of 2002, subject to compliance with the remaining provisions of regulation 6 to the said Act.

4. On relocation of the minor child to Portugal, the plaintiff shall be entitled to exercise contact with the minor child, as follows:

4.1 Direct physical contact:

4.1.1 for a period of six weeks during the minor child's European summer school holiday of each year in South Africa;

4.1.2 for a period of ten days during the minor child's European winter school holiday of each year in South Africa; and

4.1.3 at any stage during the year should the plaintiff travel to Portugal, subject to the minor child's educational requirements and extra-curricular activities.

4.2 Indirect contact in the form of telephone calls, emails, texts, Skype, WhatsApp, and FaceTime on a regular basis.

4.3 Any further or additional contact by agreement in writing between the parties.

5. The costs of the minor child's flights and travels between South Africa and Portugal, which are to take place bi-annually, during the European winter school holiday period and during mid-year, are to be paid by the defendant.

6. The plaintiff's obligations to contribute towards the minor child's maintenance costs and expenses, as provided for in the order of the Maintenance Court on 21 August 2018 under case number 698/2018/201, shall remain in place, save that the plaintiff shall, on relocation of the minor child to Portugal, pay school fees equivalent to the fees charged by Al Falaah College, which amounts will be payable monthly in advance into the defendant's nominated bank account.

7. On relocation of the minor child to Portugal, and within a period of no longer than four (4) months after arrival in that country, the defendant is directed to apply to a court with competent jurisdiction or an administrative authority (where relevant) for a mirror order to be granted on the same terms as provided for in this order.

8. The consent of the plaintiff, as required by section 18(3)*(c)*(iv) of the Children's Act 38 of 2005, for the submission of an application for a South African passport, and the issuing thereof in respect of the minor child, who has South African identity number 1[…], be and is hereby dispensed with.

9. The requirement of the plaintiff's signature in the application for a South African passport for the minor child, being the certificate of consent by both parents or guardians of a minor, is dispensed with.

10. The Director General: Home Affairs is authorised and directed to accept the application for a South African passport for the minor child at the instance of the defendant, without the plaintiff being present when the application for a passport is submitted, subject to compliance with the remaining provisions of the South African Passports and Travel Documents Act 4 of 1994, and the regulations thereto, without the signature in the certificate of consent of the plaintiff.

11. The defendant shall be entitled to retain the minor child's South African passport issued in terms of this order, and in the event of the plaintiff requiring the passport in order to travel overseas with the minor child, he is directed to return the minor child's passport to the defendant as soon as the minor child returns to South Africa.

12. The plaintiff is directed to sign all and any documents required for the issuing of a visa for the minor child to enter into and reside in Portugal, such documents to be signed by the plaintiff before a commissioner of oaths within a period of five (5) days from the date of written request from the defendant.

13. In the event of the plaintiff failing to depose to the parental consent affidavit required for a visa for the minor child, his consent is dispensed with and the applicant is entitled to apply to the Portuguese authorities without the consent of the plaintiff.

14. The plaintiff is directed to pay the defendant's costs in the proceedings under case numbers D376/2020 and D1062/2021, including all reserved costs on 5 November 2020, 6 March 2020, 17 November 2022, 14 June 2023, and 5 August 2024. Such costs shall be assessed on scale B.

15. The plaintiff is directed to pay all of the reasonable costs incurred by the defendant for the employment of her expert witness, clinical psychologist Mr Terence Dowdall, including his qualifying fees, the costs of his attendance at trial, and his traveling and accommodation costs.

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CHETTY J

Appearances

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Date of hearing:	10,11,12, & 13 March 2025
Date of Judgment:	6 June 2025 – electronically