***IN THE SUPREME COURT OF APPEAL***
***OF SOUTH AFRICA***

**Reportable**
**Case No: 52/05**

**In the matter between:**

**H[…] M[….]** **Appellant**

**and**

**M[….] G[…] W[…] F[…]** **Respondent**

**CORAM: ZULMAN, CAMERON, VAN HEERDEN, PONNAN JJA**
***et* MAYA AJA**

**Date Heard: 7 November 2005**

**Date Delivered: 1 December 2005**

**Summary: Application by custodian parent of young child for leave to remove child permanently from South Africa – child strongly bonded to both parents – interests of child first and paramount consideration.**

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**JUDGMENT**

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**MAYA AJA**

MAYA AJA:

[1] This matter raises difficult emotional issues for the parties and their young daughter, the subject of the dispute. The parties are both British citizens who settled in the Republic of South Africa as newlyweds in 1986. They were divorced during 2001. The appellant, who has custody of the child, wishes to return to the country of her birth permanently and take the child with her. The respondent refused to consent to the child's removal from the country. The appellant's application to the Johannesburg High Court for leave to remove the child from South Africa was refused by Weiner AJ, after hearing oral evidence. So was an appeal to the full court of that division (Cachalia J and Fevrier AJ concurring, Satchwell J dissenting). The appellant appeals further with the special leave of this court.

[2] In addition to the two parties and S.'s day mother since birth, Mrs S.S., three experts testified in this matter: Dr Engelbrecht (a counselling psychologist) on behalf of the appellant, and Dr Strous (an educational psychologist) and Ms Henig (a social worker) on behalf of the respondent. The evidence of the parties, Mrs S. and their experts is fully set out in the judgment of the court of first instance and I proceed to give a summary only

of the salient portions.

[3] The appellant and the respondent, aged 47 and 53 years respectively, were both born and grew up in the United Kingdom. Following their marriage there in April 1986, they came to South Africa to pursue careers in the field of information technology. The appellant worked in that field rising through the ranks to management level until her resignation in March 2003, partly due to dissatisfaction with her working conditions and partly in anticipation of her return to the UK. The respondent on the other hand branched off into other ventures over the years and has successfully established himself in the business world.

[4] When the parties were divorced on 26 April 2001, they concluded an agreement of settlement which was made an order of court. In terms of the order, custody of the child, S.R., born on [day/month] 1995, was awarded to the appellant. The award was made subject to the respondent's reasonable rights of access which include sleep-over access to S. every Tuesday and Thursday night, every alternate weekend, alternate short school holidays and half of the long school holidays in July and December. The practical effect of this arrangement is that, although the appellant is the custodian parent and S.'s primary caregiver, the parties spend almost equal amounts of time with

S. and share responsibility for her various needs. The respondent's relationship with S. was initially strained after the divorce but, through the appellant's intervention, the problems were ironed out with the professional help of a social worker. The parties live within easy access of each other and, until the appellant's decision to relocate to the United Kingdom in late 2002, exercised their shared parenting arrangement without problems.

[5] The appellant wishes to return to the country which she regards as her 'home', where all her family (and, indeed, all of the respondent's family) reside. Save for two close friends, she feels that she has no support system in South Africa, where she is unhappy and depressed. She is concerned about the high level of violent crime and her perceived lack of financial and employment security here. By contrast, she believes that both she and S. will have an improved quality of life and more safety and security in the United Kingdom. In her view, she will be able to provide S. with better educational and other life-enhancing opportunities in that country, where she (the appellant) will have better employment prospects and a far superior social security structure, in addition to very affordable health care for both herself and S.. She tendered to the respondent liberal visitation blocks and regular telephonic, visual electronic and internet contact with S. should her application be successful. The respondent's main contentions were that the

child would be removed from her present stable and secure environment, that she would suffer a decline in her standard of living and that, most importantly, she would lose the benefit of her close and meaningful relationship with him.

[6] There were material points of variance in the respective approaches, findings and recommendations of the experts called by the parties. They however agreed, as the parties had, that S. is well-adjusted and developmentally on track, excels at school, enjoys excellent relationships with, is deeply attached to both her parents and is settled, happy and stable in her present environment. Separation from either of her parents would be detrimental to her well-being.

[7] The essence of their findings is captured in their joint report, the relevant part of which reads as follows:

'3. S. is attached to both her parents. We generally agree that separation from either parent would be deleterious to her well-being. We agree that separation from her mother is likely to be severely detrimental to her. Henig and Strous believe that separation from her father has the potential to be severely detrimental to S.. Engelbrecht believes that she will be negatively affected by separation from her father but that the effect of this impact would be moderated by the nature, regularity and predictability of contact that she will have with her father.

4. The experts noted that they applied different primary evaluation criteria in preparing their reports and recommendations in this matter. Henig and Strous based their recommendations primarily on the best interest criterion whereas Engelbrecht utilised the criterion of whether there are compelling reasons for S. not to go to the United Kingdom.

5. All the experts believe that according to the best interest criterion it is in a child's best interest to have both her parents in close proximity.'

[8] As was accepted by both the court of first instance and the majority of the court a quo, the point of departure of Dr Strous and Ms Henig was clearly the correct one. The criterion consistently applied by the courts in deciding matters of this nature is now entrenched in s 28(2) of the Constitution which provides that '[a] child's best interests are of paramount importance in every matter concerning the child'.[1] The 'best interests of the child' standard is, however, of necessity an indeterminate and relative one as the circumstances of each child within each family unit will vary across a wide spectrum of factors.[2]

[9] The legal principles applicable in relocation cases were recently set

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[1] So too, in terms of article 3(1) of the United Nations Convention on the Rights of the Child (1989), ratified by South Africa on 16 January 1995, 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. This best interests of the child standard is also enshrined in article 16(1) of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979), ratified by South Africa in December 1995 and brought into force here on 16 January 1996.

[2] See eg *Boberg's Law of Persons and the Family* 2ed (1999) p 502-504 and the other authorities there cited.

out by this court in the majority judgment of Scott JA in *Jackson v Jackson*[3] as follows:

'It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be *bona fide* and reasonable. 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.'

[10] In deciding whether or not relocation will be in the child's best interests the court must carefully evaluate, weigh and balance a myriad of competing factors,[4] including the child's wishes in appropriate cases.[5] It is

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3 2002 (2) SA 303 (SCA) para 2 at 318E-I.

4 See eg *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C).

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*,[6] 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*:[7]

'[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 and the emotions or impulses which have contributed to it.'[8]

The reason for this deference is explained in the minority judgment of

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5 In terms of one of the key tenets of the United Nations Convention on the Rights of the Child, the courts must 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child' (article 12). Thus, if the court is satisfied that the child in question has the requisite intellectual and emotional maturity to make an informed and intelligent judgment, then the court should give serious consideration to the child's expressed preference (see *McCall v McCall* 1994 (3) SA 210 (C) at 207H-J).

6 1979 (3) SA 128 (A).

7 1969 (3) SA 529 (A) at 532E-F.

8 At 136B-C.

Cloete AJA in the *Jackson*[9] 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".'

[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.[10] 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.

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9 Para 34 at 317E-F.

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[11] - 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.[12] It is still predominantly women who care

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10 Sections 10, 14 and 21 of the Consitution.

11 Elsje Bonthuys 'Clean Breaks: Custody, Access and Parents' Rights to Relocate' (2000) 16 *SAJHR* 487 refers in this regard to 'a systematic lack of reciprocity when dealing with the parents of the child. While the custodian may be prevented from relocating by the interests of the children, the non-custodian may relocate at will. While the custodian can be compelled to facilitate access to the child, the non-custodian parent can not be compelled to contact the child, whether or not such contact would be beneficial to the child' (at 496).

12 See eg the remarks of several judges in the Constitutional Court case of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) paras 37-38 (per Goldstone J), paras 80 and 83 (per Kriegler J), para 93 (per Mokgoro J) and paras 109-110 and 113 (per O'Regan J).

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.[13] As was pointed out by Gaudron J in a minority judgment in *U v U*,[14] the leading Australian case on relocation:

'…it 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.'

[13] 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

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[13] See Bonthuys op cit 501-506.

[14] [2002] HCA 36 at para 36.

welfare'.[15] 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.

[14] Counsel for the appellant contended that both the trial court and the full court, in refusing the appellant leave to relocate, over-emphasised the disruptive effect that the relocation would have on the respondent's relationship with S.. According to counsel, both courts in effect found that the maintenance of the current relationship between S. and her father was determinative and conclusive of the issue of what was in the best interest of

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[15] *Payne v Payne* [2001] 1 FLR 1052 (CA) para 40 (per Thorpe LJ). In this case, the father appealed against an order giving the mother leave to remove their four-year-old daughter permanently to New Zealand. He argued that the principles applied by the English courts in relocation applications created an unwarranted legal presumption in favour of leave to relocate which was in breach of his right to respect for family life in terms of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and in conflict with his right to contact with the child in terms of the Children Act 1989. The Court of Appeal rejected this argument, reiterating that the matter was governed by the 'welfare principle' (the best interests of the child criterion) and that, although the reasonable proposals of the custodian parent was a factor of 'great weight', it did not have the status of a presumption in favour of granting leave. (See further the discussion of this case by Andrew Bainham in 'Taking Children Abroad: Human Rights, Welfare and the Courts' (2001) *CLJ* 489 and generally *Children: The Modern Law* 3ed (2005) 746-749.) In *D v S* [2002] NZFLR 116, however, the Court of Appeal of New Zealand criticised the approach in *Payne*, holding that it was 'inconsistent with the wider all-factor child-centred approach required under New Zealand law…[which] requires the reasonableness of a parent's desire to relocate with the children to be assessed in relation to the disadvantages to the children of reduced contact with the other parent, along with all other factors' (para 47).

the minor child.

[15] In coming to her conclusion that it was not in S.'s best interests that the appellant be permitted to remove her permanently to the United Kingdom, the trial judge relied heavily on the following passage from the majority judgment of Scott JA in the *Jackson*[16] case:

'To afford less weight to something as important as the relationship between mother and young daughters simply because the former is the non-custodian parent is to prefer the rights of the custodian parent over the interests of the children. That is a wrong approach. It is particularly so on the facts of the present case, where both parents continued to exercise a more or less equal parenting role and where there had been no real separation between children and the "non-custodian" parent. It cannot be over-emphasised that each case must be decided on the basis of its own particular facts. The question in issue was whether it was in the interests of the children that they be separated from the mother and taken to Australia. That she was the "non-custodian" parent was of no relevance to this enquiry.'

[16] The *Jackson* case involved an appeal against the refusal of an application by the custodian father of two young girls for leave to emigrate with them to Australia. The non-custodian mother had previously approved the move and was to emigrate as well, but changed her mind after the divorce. As in this case, the children had, after the divorce, continued to

spend more or less equal amounts of time with both parents and enjoyed very secure attachments to them both. As Scott JA[17] stated:

'Of particular importance in the present case is the fact that there has as yet been no real separation between mother and children. To this extent therefore this present case differs materially from all those where the access of the non-custodian parent is limited to something in the region of alternate weekends. Were the children to be taken to Australia the consequence would be the replacement of the mother's almost equal parenting role with what in effect would be bi-annual visits of a few weeks each….

What emerges from the evidence, viewed in its totality, is that if removed from their mother and taken to Australia both young girls …will suffer "a great deal of pain and trauma". Although opinions may differ, as far as the younger child Tasya concerned there must, at the least, be a real risk of psychological harm. The father made it clear that his primary reason for wishing to emigrate to Australia was for the sake of the children. The question is therefore whether the advantages of a move to Australia at this stage in the lives of these young children justify the pain and trauma they will undoubtedly both experience and the real possibility of Tasya suffering psychological harm.'

[17] I cannot accept, as Weiner AJ suggested, that Scott JA's approach 'is a deviation from previous decisions of this nature in which the custodian parent's decision (if reasonable and rational) was usually held to be sufficient to justify relocation', nor that 'the interests of the non-custodian

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16 Para 14 at 323C-D.

17 Paras 10 and 12 at 321B-C and 332D.

parent and the obvious disruption to the relationship with the child have largely been ignored until the decision in the *Jackson* matter'. Insofar as Weiner AJ was referring to the judgment of Nugent J in *Godbeer v* Godbeer,[18] as referred to extensively by Goldblatt J in the unreported case of *Cocking v Van der Walt,*[19] a careful perusal of both these judgments reveals that due weight was indeed given to the importance of the non-custodian parent's relationship with his minor children in the particular circumstances of those cases. 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 in so far as such refusal may have an adverse effect on the custodian parent and in turn the child.

[18] Notwithstanding these reservations about the interpretation of the majority judgment in the *Jackson* case, I cannot endorse the submission by counsel for the appellant that the learned Judge placed undue weight on the consideration of not 'interrupting [the] close psychological and emotional bond which a child has with the non-custodian parent'. In the present case,

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[18] 2000 (3) SA 976 (W).

[19] Case No 7070/03 – 3 July 2003, WLD.

all three experts testified that S. had a close psychological and emotional bond with both her parents. The joint minute complied by the experts is very telling, in that all three agree that it is in her best interests to have both her parents in close proximity and that separation from either parent would be deleterious to her well-being. Even Dr Engelbrecht, who held the view that any long-term detrimental consequences of separation from the respondent would be moderated by the envisaged extent and regularity of contact between them, conceded in her testimony that the relocation had real risks. These included the 'thinning' of S.'s relationship with her father, which could result in feelings of abandonment, deprivation, loss, shame and anger. Furthermore, from the evidence, it is apparent that S. herself is adamant that she does not want to live in any country if both her parents do not live there. Despite her young age and comparative immaturity, her views cannot be totally ignored.

[19] It is, moreover, in my view clear from the judgment of the trial court that it did indeed pay regard to factors other than the potential negative effect of the proposed relocation on the relationship between the respondent and his daughter. There is no question that the appellant's decision to relocate was undertaken honestly and in good faith. The desire to return to the country one regards as home, where one grew up and lived until

adulthood, and a longing for family support, are deep emotional needs which, to my mind, are no less important than relocating to a new country with a new partner and family unit or to pursue an important career opportunity. This is particularly so in the appellant's situation where the very reason that brought her to this country, her marriage to the respondent, has disintegrated, leaving her isolated. The appellant has flirted with the idea of returning to her 'home' since 1997 but bided her time even after the divorce and took the final decision only in 2002. She clearly realises the importance of the respondent's role in her daughter's life -- this is proved, inter alia, by her concerted and sustained endeavours to foster his relationship with S. the child after the divorce. Her willingness to allow him generous access to S. if her application succeeds and her offer to involve the International Social Services to monitor the child's adjustment in the United Kingdom is further proof of her *bona fides*. It certainly cannot be suggested in the circumstances that she is motivated by some malicious desire to exclude the respondent from S.'s life.

[20] Genuine as the appellant's motivation is, however, I am constrained to agree with the conclusion of the trial court that the practicalities of her decision were certainly not as well-researched and investigated as they should have been. With the knowledge that the respondent was opposed to

the move, she resigned her job, sold her house and motor vehicle, shipped her furniture and the family pet to the United Kingdom and informed the child's school that she would be leaving. She had not, at that stage, made any settled plans for the relocation regarding employment and had not even considered what their living expenses in the United Kingdom would be. She did that only during the course of the proceedings, upon being granted leave by the court to supplement her papers on aspects relating to the schooling and after-care arrangements for S. and her employment prospects in the United Kingdom.

[21] By the time the matter went to oral evidence, she had secured a temporary, low-paying job in the United Kingdom, but still had no letter of appointment which provided the precise details of her working conditions, income and tax obligations. She had no idea what the child benefit with which she hoped to augment her income would be or what after-care for S., on the days when she would not be able to fetch her after school, would cost. She was uncertain if she would keep her current temporary job and what her future employment prospects were. The only real and readily accessible source of emotional and physical support that the appellant would have in her homeland would be her near-octogenarian mother with whom she planned to live. Confronted with her obvious lack of any structured plan for

the relocation, she admitted that her plans were ‘constantly changing’. There are just too many imponderables in the appellant’s plans to enable the court to assess the likely effect of the move on S.’s physical, emotional and psychological well-being. When these imponderables are ‘weighed up’ against the agreed opinion of all three experts that S.’s interest would best be served by remaining in proximity to both parents and that a separation from either parent would be prejudicial to her well-being, the decision of both the trial court and the majority in the full court not to permit the appellant to relocate to the United Kingdom with her daughter cannot be faulted.

[22] This finding will obviously disappoint the appellant. However, almost two years have elapsed since the judgment of the trial court was delivered and there is no suggestion that she has not coped with the reality of her situation in the interim. Her evidence was that, since her daughter’s birth, her mother visits them in South Africa for two to three months every year. The appellant likewise visits the United Kingdom on a regular basis. These visits should assist in alleviating any feelings of isolation, homesickness and disenchantment that she may suffer from time to time.

[23] Furthermore, the court’s refusal to grant the appellant leave to relocate with S. now is not immutable and does not mean that she may not obtain

leave to return home with her daughter in the not too distant future if circumstances so justify. As the respondent's counsel pointed out, S. will be going to high school in three years' time. Changes to her social and scholastic life will then be inevitable. She will also be older and thus in a better position to form responsible judgments and state her own preferences. These changed circumstances may well make the feasibility and desirability of a move to the United Kingdom much easier to evaluate. There is nothing to prevent the appellant in the interim from re-establishing herself in her chosen profession and earning a decent income in this country. Should she require additional financial support for S. until such time as she is able to do so, it would seem that the respondent's financial position is such that he would be easily able to provide such support.

[24] There is another issue that must be addressed. The respondent made an application in terms of section 22(a) of the Supreme Court Act 59 of 1959 to have this court canvass with the child at the hearing of the appeal her views on her proposed relocation to the United Kingdom. He based the application on the fact that almost three years have elapsed since the launch of the original application and expressed the view that ascertaining her wishes at this stage may assist the court. He relied on article 12 of the Convention on the Rights of the Child which, as indicated above, enjoins

States Parties ‘to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child [and] for this purpose, [provide the child] the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’

[25] A court must of course take a child’s wishes into account where the child is old enough to articulate his or her preferences. It is true that S. is considerably older than at the commencement of the proceedings, but I am not convinced that the course proposed by the respondent was proper. The respondent himself mentioned in one of his affidavits in the earlier proceedings that the litigation was causing S. stress, that she had occasionally queried having to attend the interviews with the experts and was not ‘particularly comfortable’ with the exercise. This is understandable. If S. found interaction with professionals (who are trained in child psychology and possess the requisite skill and sensitivity to conduct the relevant enquiry) daunting, it is then only logical to expect an encounter with five strange judges, ill-equipped to deal with the situation, to be thoroughly

intimidating. Such an exercise clearly would not bear much, if any, fruit. It seems to me that, if either of the parties considered that there was a need to submit additional evidence in this regard, the proper route to follow would have been to have had S. interviewed by appropriate professionals, as was done previously, and to seek to place that evidence before the court.

[26] In any event, there is already evidence on record that S. has, as most children would in the circumstances, expressed a wish to remain with both her parents. I hardly think that the respondent would suggest having her being interviewed by the court if her views had changed. The application was ill-advised and poorly conceived in addition to being unprecedented. How was this court to ascertain, what in truth was the view of the child and how were the five members of this court to record their impressions? Were those impressions, assuming them to be unanimous, to constitute admissible evidence and how, if at all, was it to be introduced into the record? What evidential weight, if any, was to attach to those impressions and were the parties to be allowed an opportunity to adduce further evidence in consequence of its receipt? Those were just some of the difficulties that confronted counsel for the respondent when she sought to argue the application. There evidently was no answer to those difficulties and the application must thus be dismissed. I cannot imagine that the appellant

should be burdened with having to pay her own costs in respect of an application as unmeritorious as this. It must follow that in respect of this application the respondent must pay the costs.

[27] The costs of the appeal do not pose a problem. It seems to be common cause that, in pursuing these proceedings, both parties acted *bona fide* in what each perceived to be their child's best interests. This being so, I am of the view that each party should bear his or her own costs of appeal. The costs order made by the full court must, however, in my view be reconsidered. In awarding the respondent the costs of the appeal, the court held, *inter alia*, that it would be unfair for the respondent to continue to have to pay for his legal costs and that there must be some disincentive to the continuation of litigation. In that, for the reasons that follow, the full court, in my view, misdirected itself. While mindful of the fact that one is here dealing with the exercise of a judicial discretion, I nevertheless cannot agree with the consideration mentioned. Such an approach may be justified in the case of frivolous or vexatious litigation by parents in respect of minor children. This case hardly fits that mould and its facts do not warrant the infliction of adverse costs orders to penalise or discourage the parties, acting in good faith and out of concern for their minor child, from accessing the courts to protect and advance her interests.

[28] No doubt the approach of the full court was informed by its reasoning preceding as well as its conclusion that courts 'cannot be held hostage to the feelings of aggrieved litigants'. That approach ignores the societal burdens that are visited on custodial parents. Custodial parents, unlike non-custodial parents, who are free to flit in and out of their children's lives at their convenience, must of necessity often subvert their own interests to those of their children. Life choices that they may wish to make are sometimes, as here, subject to the agreement of their former spouse. The appellant's motivation for initially moving to this country, namely to establish a family with the respondent, has now all but disappeared through no fault of her own. Little wonder then that she now feels the need to return to her 'home'. The solace that she feels can be derived from that move is not to be underestimated. In endeavouring to foster a relationship between her daughter and the appellant when that was in danger of faltering, her conduct has been nothing short of laudable. She can hardly be credited with any improper motive in approaching the courts. She has throughout done what she thought was best for S.. Her decision to relocate, although perhaps ill-advised and precipitate, was born in part out of a genuine belief that the move would also be best for the child. It must follow that the decision by the majority in the court a quo to mulct her with costs of that appeal is far from

fair and cannot be sustained.

[29] In the circumstances, the following order is made:

(a) Save to the extent set out in (b) and (c) herein below, the appeal is dismissed and each party is ordered to pay his or her own costs.

(b) The costs order of the court a quo is set aside and replaced with

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

(c) The respondent's application in terms of s 22(a) of the Supreme Court Act 59 of 1959 for this court to canvass with the minor child at the hearing of the appeal her views on her proposed relocation to the United Kingdom is dismissed with costs.

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**M.M.L. MAYA**
**ACTING JUDGE OF APPEAL**

**Concur:** **Zulman JA**
**Cameron JA**
**Van Heerden JA**
**Ponnan JA**