NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT

Case No. 35322/2012

DATE:14/09/2012

In the matter between:

GCH PLAINTIFF

and

GNB DEFENDANT

JUDGMENT

J.W. LOUW. J:

[11 The applicant and the respondent were previously married. They were divorced on 1 February 2010. Two sons were born of the marriage, B, who is presently 13 years old, and T, who is 11. In terms of the settlement agreement concluded between the parties on 7 October 2009, which was made an order of court, both parties retained their parental responsibilities and rights in respect of the care of the children. The primary residence of the children was

awarded to the applicant. The respondent's rights of contact with the boys were spelt out in the agreement. The applicant has been the primary caregiver of the children since the respondent left the common home in May 2008.

[2] The applicant now applies for an order granting consent for the two boys to relocate with her to Australia. The respondent opposes the application. He has also filed a counter-application for an order that, in the event that the applicant leaves south Africa without the two minor children, clauses 2 and 3 of the settlement agreement in the divorce action, which deal with the parties' rights and responsibilities in respect of the children and with the maintenance which the respondent has to pay for the children, be deleted, alternatively that, in the event that the court grants an order authorising the applicant to remove the children to Australia, that certain specified contact rights with the children be granted to the respondent.

[3]The applicant is a hairdresser. She has, since November 2009, had a life partner, C J C, referred to in the papers as C. She has been struggling since the divorce to make ends meet. C has been contributing towards the maintenance of the joint household for the past two years. To make matters worse, the respondent's financial position has deteriorated, with the result that, during the course of 2011, he cancelled the children's after school care for which he was obliged to pay in terms of the divorce order. He further indicated that the children had to be transferred from the private school they were attending to a government school from the beginning of 2012 as he could no longer afford the private school fees. The applicant accepted the position, but this has resulted in her having to change her working hours in order to help the children with their homework form 13:30 to 16:00. She then continues to see clients from 16:00 to 21:30. The respondent has further indicated that he wants to reduce the maintenance of R14 000 per month which he has been paying for the two children to R5000

per month. The applicant says this will make it impossible for her to provide in the needs of the children. In this regard, the respondent has caused an application to be enrolled in the maintenance court for 12 September 2012. It is uncertain at this stage whether the matter will proceed on that date as the application has apparently not been served on the applicant personally.

[4] C received an employment offer from Lubritene Australia (Pty) Ltd in March of this year after going to Australia at the end of January to seek employment. The applicant says that she and C had been looking at options to secure a more stable and financially secure future for them and the boys, and that she has agreed to join him in Australia as this has always been their goal. He accepted the employment offer and their intention is to get married soon. The company agreed to sponsor a visa, referred to as a 457 visa, for four people and to pay for the relocation costs of the applicant and the two children to Australia.

[5] As a result, the applicant approached the respondent for his consent to the relocation of the children. He was not prepared to grant his consent. As a result, she approached C's employer and advised them that it appeared that she and C would have to relocate to Australia separately. She was informed that she would then need to request that the 457 visa sponsorship be split. She made the request to ensure that the process was not delayed and that there was no hold-up from C commencing his employment. She was, however, informed that the company would only honour the sponsorship for her and the children if such application was made and granted within a period of twelve months from March 2012. In the event that she did not apply for the split 457 visa and arrive in Australia within the twelve month period, she would herself be responsible for all the costs pertaining to the emigration, which will amount to approximately R120 000.00.

[6] A number of e-mails were exchanged between the applicant and the respondent, but this did not resolve the impasse. The applicant thereafter consulted an attorney who responded to certain questions which the respondent had raised. This also did not resolve the issue and the applicant's attorney then proposed in a letter of 27 March 2012 that the matter be referred to mediation and that an independent psychologist be appointed with a view of settling the matter. The respondent, through his attorney, agreed to the mediation on condition that the applicant will be fully responsible for the costs of the mediation. The mediator which the parties agreed upon was Ms Sheetal Vallabh, a clinical psychologist.

[7] The mediation was unsuccessful. The respondent has attached a copy of Ms Vallabh's minutes of her consultation with each of the boys to his answering affidavit. It appears from the minutes of the consultation with Bradley that he wanted to go to Australia with his mother and C, but that he was going to miss his father with whom he had a close bond. He wanted to see his father every holiday. He was disappointed that his father wanted to stop them from going to Australia. He described his relationship with his mother as "exceptional". He described his relationship with C as "very good" and "exceptional" and said that C treated them "like his own precious children". He could talk to him about things like school and sports. He described Jeanine, his father's girlfriend, as "very friendly" and "kind-hearted".

[8] According to Ms Vallabh's minutes of her interview with Trenton, he described his relationship with his mother as "close" and said that he can share a lot with her. He said that _ he wants to go to Australia "because it will be better for (him)". He does not like South Africa because, e.g., his mother was robbed at an ATM. He does not feel safe in South Africa. With regard to his father, he said that he enjoyed the activities with his father such as riding, motor

biking, fishing and camping, but that he did not like the 4x4 bakkie because it was "scary". He also felt that his father is sometimes "reckless on the racetrack" - "he's a good rider but I feel frightened when he does that". He wants to go to Australia with his mother and C, but wants his father to come to Australia every holiday, but if this was not possible then visiting South Africa would also be "fine". He described his relationship with C as "very strong" and that he gave him good advice, e.g. a good system for doing homework. He said that C can be "uplifting" when he feels "sad". He believes going to Australia is better for him even though it is hard to leave his father. He described his relationship with Jeanine as "pretty good".

[9] The respondent believes that it will not be in the best interest of the children to relocate to Australia with the applicant. His main objections are that the applicant wants to go to Australia to suit her own desires and that she has not placed the interest and well-being of the children at the forefront of her decision, that she wants to go without any proper plans in place, that C's employment contract entitles the employer to give two week's notice of termination and if he does not find other employment within thirty days he must leave Australia, that the applicant has no work in Australia, that she has not secured accommodation, that she has not enrolled the children in any schools and that she has no family or support system in Australia.

[10] Some of the respondent's concerns were raised and dealt with in the e-mails which were exchanged between the applicant and the respondent and also in letters which were exchanged between the applicant's attorneys and the respondent's attorneys. In regard to the applicant's employment in Australia, the applicant's attorneys recorded in their letter of 16 April 2012 that the applicant will be able to secure employment as a hairdresser in view thereof that hairdressers are listed on the skills shortage list and that she would more than likely secure such employment at a salary of AUS$3 500.00 per month. If possible, she

intended not to work for the first six months in order to assist the children in integrating and adapting to their new lifestyle. In this regard, her intentions are to sell her house in South Africa and to use the proceeds, which she expects to be about R600 000.00, to tide her over this period.

[11] As far as accommodation is concerned, the letter records that, although she has done research of available accommodation in Lansdale, Perth, where she intends to move, this can only be finalised once she is in Australia. Pending the securing of accommodation, the applicant and the children will reside with C's parents in Lansdale. Pictures of the house were attached. Both boys will have their own rooms.

[12] In regard to school arrangements for the boys, an e-mail was attached from Lansdale Primary School in which it was confirmed that they will accommodate the children and will integrate them immediately. C's parents' house is near the Lansdale Primary School. C's brother's children attend the same school.

[13] The applicant's support system will include C's parents and his sister and sister-in-law. C's parents have indicated that they are excited that the applicant and the children will be living with them until the applicant and C have found accommodation for themselves. His sister has indicated that she will look after the children after school if the applicant's work hours do not permit her to be at home in the afternoons. The applicant, however, plans to get a half-day job so that she can look after the children in the afternoons.

[14] C has deposed to an affidavit in which he confirms that he and the applicant plan to get married soon, that he has contributed to the applicant's legal costs and that he continuously

contributes towards the applicant's and the children's financial needs. He has provided details of what, according to his experience, the monthly expenditure is for a family of four in Australia, viz. R6 209. His income of AUS$7000.00 per month is sufficient to cover such expenditure.

[15] The applicant says that her financial situation in South Africa is dire and that she and the children are living from hand to mouth. She states that this situation will be changed substantially should they go to Australia as C has secured a better and higher paying job and she will be earning a higher income as a hairdresser. Her present average income is R15 000.00 per month.

[16] It is understandable that the respondent has concerns over the children's well-being if they were allowed to emigrate to Australia with the applicant. The question is whether the arrangements which the applicant has made are sufficient to . ensure the well-being of the children. On a conspectus of all the evidence, which is too voluminous to repeat in detail, I have come to the conclusion that the applicant has done what she could in all the circumstances to ensure that the children will be properly cared for. It is obviously not possible to plan ahead for every eventuality, such as what would happen if her relationship with C were to come to an end or if C were to loose his job and not find other employment, which are some of the things which have concerned the respondent.

[17] Ultimately, what has to be decided is what is in the best interest of the children. In this regard, s. 10 of the Children's •Act, 38 of 2005, is important. It provides the following:

"Every child that is of such an age, maturity and stage of development as to be able to

participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

[18] I have mentioned that B is 13 years old and T 11. B goes to high school next year. T turns 12-in November and next year will be his final year in primary school. With the approval of the parties' counsel, I consulted with the boys in my chambers. My clear impression is that they are undoubtedly of such age, maturity and stage of development that they are able, and should, participate in this matter. They both conveyed to me in no uncertain terms that, although they have a good relationship with their father and although they know they will be seeing less of him if they were to relocate to Australia, they have decided that they want to go to Australia with their mother. I conveyed this information to counsel.

[19] During argument, respondent's counsel submitted that I should not decide the matter without the benefit of a report by the family advocate. I was informed that both parties and the children had consulted with the family advocate but that the family advocate had not been able to prepare a report within the time available. For this reason, and in order to clarify another issue raised in argument by respondent's counsel, namely whether the applicant would be granted a visa without having secured a job in Australia, I directed that the matter stand down for a week.

[20] When the matter resumed1,[1] I was provided with a report by the family advocate and one by a family counselor, a social worker, who, according to her report, had interviewed the parties jointly with the family advocate on 21 August 2012, which was two days before the date for which the matter had been set down. In regard to the children's views, the family

1 When the matter resumed, I was informed by the respondent that he had terminated the services of his leizal representatives as he could no longer afford to pay for their services. He elected lo proceed on his own.

advocate refers to the report of the family counselor and states that in essence their views are that they wish to accompany the applicant to Australia but on the other hand ' confirmed that they "will lose out from their relationship they have with the Respondent", The family counselor states the following about her interview with :

"6.1.2 B indicated that he realized that the purpose was about his views, opinions and wishes with regard to his mother's application to relocate to Australia. When asked how he feels about the relocation, he responded that he has mixed feelings because he wants to relocate with his mother and at the same time he feels he should stay with his father. B reported that he has never been to Australia. He further reported that he wishes to relocate to Australia to explore because the applicant told him a tot about Australia.

6.1.3 B reported that Australia has better opportunities in terms of education and sporting activities. He informed that there is no litter, the climate is humid like Durban's weather and he will be able to go to the beach everyday after school. When asked whether his views would change if he did not have information about the country, he responded he will still go because 'I want to be with my mother'."

[21] She states the following concerning her interview with T:

"6.2.2 T informed that his parents explained the purpose of the assessment to him. He reported that his mother wants to relocate to Australia and that his father does not want them (siblings) to go with their mother.

6.2.3 T was then asked about his thought about relocating; he replied that his wish is for both parents to relocate to Australia because he does not want to hurt/please either of them. T

then said 7 know that my wish' is not attainable. Therefore I have decided to do what is best for me and I want to relocate with my mother'."

[22] The children have therefore on three occasions expressed their wish to accompany their mother to Australia. Their decision must be given serious consideration and cannot be ignored.

[23] Despite the clear wishes expressed by both children, the family advocate and the family counselor recommend that the intended relocation of the children to Australia "may not be in their best interest at this stage" and that "it cannot be concluded that it is in the best interest of the minor children to relocate to Australia". Both reports set out the views of the applicant, the respondent and the children, and refer to the various factors which have to be taken into account in terms of s. 7 of the Children's Act, 38 of 2005. The reports then conclude with the aforesaid recommendation without clearly motivating why the recommendation is made. The reports are therefore, unfortunately, not of much assistance.

[24] In F v. F, 2006 (3) 5A 42 (SCA), the Supreme Court of Appeal, in paragraph [9] of the judgment, quoted with approval the following legal principles applicable in relocation cases as set out in Jackson v. Jackson, 2002(2) SA 303 (SCA):

'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 of 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..... '

The court then proceeded to add the following:

"[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, including 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 been properly awarded custody to choose in a reasonable manner how to order his or her life. Thus, for example, in Bailey v Bailey[2], 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[3]:

'[This 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

2 1979 (3)SA 128(A)
3 1969 (3) SA 529(D) al 532E -F

override the custodian parent's decision as to what is best in the interest 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 decision 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. 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..... "

[25] The children have been living with the applicant since 2008 when the applicant and the respondent separated. The applicant has since then been the primary caregiver of the children. Her evidence is that, without the financial assistance of C, she cannot maintain the children on her income and the maintenance which the respondent pays for the children. Her financial position will become worse if the respondent's application for reduction of the maintenance is successful. On the information she has provided, her financial position in Australia will be better and she will be in a better position to provide for the children's needs. With the prospect of getting married to C and setting up home with him, her position will be more stable than what it is at present, which will undoubtedly be to the benefit of the children. She has indicated that if she is not allowed to take the children with her to Australia, she will not go on her own and that this will inevitably lead to the termination of her relationship with C. This will, no doubt, cause the sort of frustration and bitterness referred to in F v F, which will not contribute to a healthy and secure atmosphere for the children.

[26] On a conspectus of all the evidence, I am satisfied that the applicant's decision to relocate to Australia with the children is bona fide and reasonable and that the court would not be justified in overriding that decision. It is clear from all the evidence that the applicant's decision is not motivated by a desire to frustrate the respondent's rights of access to the children. On the contrary, the applicant has, in her notice of motion, made extensive proposals to ensure that the children will have as much contact with the respondent as will, under the circumstances, be reasonably possible and also to keep the respondent advised of all aspects of the children's physical and emotional well-being, their progress at school and their involvement in the activities in which they will take part, to furnish the respondent with

copies of their school reports and to consult with the respondent in advance of enrolling them in any educational institution.

[27] A factor which has weighed heavily with me in coming to the conclusion that the applicant should be permitted to relocate to Australia with the children, are the views of the children themselves as expressed to Ms Vallabh, myself, the family advocate and the family counselor that they have decided that they want to go to Australia with their mother. In view of the good relationship which they have with the respondent, the decision must, undoubtedly, have been a very difficult one and one which caused them much anguish. But they have taken the decision and if due regard is had to their age, maturity and stage of development, their decision must carry weight and must be respected.

[28] Applicant's counsel has prepared a draft order which is in the same terms as the notice of motion, save that prayer 1 thereof provides for a date, to be decided by the court, from which the applicant is authorized to remove the children for permanent residence with the applicant in Australia. The applicant proposed the date of 30 September 2012 in view thereof that the last school term of the year in Australia commences on 16 October 2012. The proposed date in my view is reasonable, and I will accordingly amend the draft order by inserting the date of- 30 September 2012 in paragraph 1 thereof.

[29] The respondent submitted that, in the event that the applicant is permitted to relocate to Australia, the order should also provide that if he visits the children in Australia, he should be permitted to take the children to Melbourne where his mother resides. This request is obviously reasonable, subject to the children's obligations in respect of their schooling.

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

(a) The draft order, which is marked "X", is amended by inserting the date 30 September in the space provided in paragraph 1 thereof and by inserting the following wording at the end of paragraph 5.6 thereof:

"and will further include the right to take the minor children with him to visit his mother in Melbourne, subject to the children's school routine".

(b) The draft order, as amended, is made an order of court.

The respondent's counterclaim is dismissed, Each party will pay his or her own costs.

Applicant's counsel: Adv. L.C. Haupt

Respondent's counsel: Adv. J.A. Woodward SC

Applicant's attorneys: De Jager Inc, Pretoria

Respondent's attorneys: Clarks Attorneys, Johannesburg