IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 30669 /2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

12 AUGUST 2022

In the matter between:

L[....] L[....]2 N[....] Applicant

[Identity Number: [....]]

And

T[....] C[....] N[....] Respondent

Born M[....]

[Identity Number: [....]]

JUDGMENT.

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 12 August 2022

[1] This is an opposed urgent application in terms of Section 18 (3) (c) (iii) of the Children's Act,[1] for permission of the Applicant to leave the Republic of South Africa with two minor children; and to compel the Respondent to sign all necessary documents in order for the minor children to obtain passports, and by failure to sign the documents, for the Applicant to sign in her stead.

[2] The Applicant is the biological father of the two minor children and the Respondent is their biological mother.

[3] The Applicant and the Respondent were married to each other on 23 November 2007. Two minor children were born of the marriage between the parties. The Applicant and the Respondent are currently embroiled in divorce litigation in the Regional Court, Pretoria and in that action the primary residency of the minor children is in dispute.

[4] On application in terms of Rule 58 of the Magistrate's Court Rules, and after an investigation by an independent Social Worker, the presiding Acting Magistrate Luus, granted an order that the minor children be placed, in the interim, in the primary care of the Applicant. The minor children are, therefore, presently in the primary care of the Applicant since September 2021. In terms of the said Court order, the Respondent may, amongst others, contact the minor children and remove them to her residence at every alternative weekend and school holiday.

[5] This has not been possible for different reasons raised by the parties respectively. According to the Applicant, the Respondent has not been to see the children because she has no interest at all in them. Whilst it is the Respondent's averment that she has not been able to see the children because the Applicant

[1] Act 38 of 2005.

refuses her access to the children. It is, however, common cause that at the time of the institution of these proceedings, the Respondent had last seen the children in March 2022.

[6] The Applicant is employed by the South African State Security Agency, and one of the conditions of his employment is placement to represent the Country in other countries. It is common cause that whilst the parties were still staying together, the family as a unit resided in various countries where the Applicant was deployed.

[7] During April 2022 the Applicant, was informed that he is deployed to Algeria. His initial departure was scheduled for middle May 2022 but due to this court case the date of departure has been extended on several occasions and the imminent date is the 16 August 2022. It is said that initially the Respondent indicated that she does not object that the children accompany the Applicant to Algeria. She, however, had a change of heart and on 27 May 2022 through her attorney of record, for the first time, she formally refused to give the necessary permission for the children to accompany the Applicant to Algeria. This, however, is denied by the respondent

[8] This matter was initially heard in the urgent Court on 21 June 2022 before Haupt AJ who ruled the matter to be urgent. The matter is, thus, properly before this urgent Court.

[9] In addition, Haupt AJ made an order that an investigation by a Clinical Psychologist should be conducted. She in the circumstances ordered, amongst others, that –

> "3. Ms Malebo Mashaba, an independent Clinical Psychologist, is instructed to conduct an urgent investigation as to the best interest of the minor children, with specific reference to the primary residence and care of and contact to the two minor children born of the marriage and the Applicant's possible relocation to Algeria and to provide the Honourable Court and the parties with a report. Such report to be made available by no later than 29 July 2022.

4. . . .

5. Both parties are granted leave to supplement their papers after the report contemplated paragraph 3 above is made available;"

[10] Dr Malebo Mashaba ("Dr Mashaba") was appointed at the end of June 2022 in terms of the Court Order. She made her report available to the parties on or about 28 July 2022.

[11] In the report, Dr Mashaba made the findings that –

11.1 There are no reported current challenges with taking care of the minor children as the Applicant is currently providing primary care and residence for the children;

11.2 As a result of the breakdown of communication between the parties, the Respondent had not seen the children since March 2022, and Dr Malebo, for assessment purposes, facilitated contact for the weekend of 15 July 2022 to 17 July 2022 and provided feedback that the visit went well;

11.3 Both the minor children indicated that they wish to relocate with the Applicant to Algeria. This view, as indicated in the report, was not influenced by either of the parties. The minor children reported excessive worry and concern over the Respondent's delay to sign their travelling document application.

11.4 During the clinical interview and in order to maximise neutrality, the minor children were asked of possibilities of staying behind with the Respondent and they declined the option and expressed their great need to travel as they reported that they have been travelling with both the Applicant and Respondent for years. The minor children agreed, as a result, to rather visit the Respondent during school recess as they allege to be happy living with the Applicant at this stage.

[12] Consequently, she made the following recommendations:

“5. Recommendations

From the conclusion aforementioned, the following are the recommendations made to the Court in the best interest of the minors:

- Referring the Respondent for psychotherapy to further manage the reported psychosocial stressors- this was also discussed during the clinical interview
- The minor's primary care and support currently being provided to not be interrupted as they seem to be happy, coping and willing to continue residing with the Applicant.
- For the Court to take into consideration the minor's (K[....]) psychological functioning and wellness as she has already been referred and has been to a Clinical Psychologist (Dr Mabasa) following an anxiety attack over the relocation matter.
- For the Applicant and Respondent to put aside their differences and work out a parenting plan in the best interest of the minors, that includes an agreement in terms of the children visits to either of the parents to try re-establish broken relationship.”

[13] The report was presented to this Court by the Applicant through a supplementary affidavit that the parties were permitted by the Haupt AJ to file once Dr Mashaba’s report was available. The Respondent filed a supplementary answering affidavit as well. In the answering affidavit the Respondent fully accepts the findings and recommendations of Dr Mashaba, as stated above.

[14] As indicated in Dr Mashaba’s recommendations, one of the minor children was referred and has been to a Clinical Psychologist (Dr Mabasa) following an anxiety attack over the relocation matter. The Applicant avers that the children initially consulted with Dr Mabasa in October 2021 after being referred thereto by the Social Worker which was appointed by the school. When the anxiety attack occurred, it seemed natural to him to have the child seen by Dr Mabasa since she had already consulted with her previously. Emanating from the consultation with the children Dr Mabasa made, amongst others, the following findings:

14.1 K[....] reported that she does not get along with the Respondent and that the Respondent accuses her of being disrespectful. K[....] loves her mother, but hate the things she does; and

14.2 K[....]2 was close to the Respondent, and indicated on the separation of his parents that he can phone the Respondent when he misses her. He reported that he does not wish Applicant to go to Algeria without him, and that he does not wish to reside with the Respondent.

[15] The recommendations that Dr Mabasa subsequently made do not, however, have any bearing on the application before this Court as they relate to the necessary treatment for the children.

[16] At the commencement of the hearing before this Court two issues were identified by the parties for determination by the Court. The two issues are:

16.1 Whether the Respondent will be able to access the children once they are in Algeria taking into account that Algeria is not a signatory of The Hague Convention.[2]

16.2 Whether this Court should consider the reports of Dr Mashaba and Dr Mabasa due to the fact that there is information that has been left out of their respective reports.

[17] The aforementioned issues were raised in particular by the Respondent in opposition to the granting of the prayers sought by the Applicant in the notice of motion.

[18] In oral argument before this Court, it was submitted on behalf of the Respondent that despite the fact that there is an order that permits the Respondent to have contact and remove the minor children she struggles to exercise same, and that, each time the Respondent has to see the children she must do so with the assistance of the police or her mother. The argument, as such, is that it cannot be

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[2] The 1980 Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention).

said with certainty that the Applicant, once in Algeria, will allow the Respondent access to the children because as is, access for the Respondent is difficult at the moment with the children staying not more than 10 km from where the Respondent resides.

[19] Counsel for the Respondent, further, raised the concerns of the Respondent in regard to Algeria being a non-signatory of The Hague Convention which might be a challenge for the Respondent to enforce the Order of this Court if the Applicant is granted the relief he seeks in these papers.

[20] Conversely, it was argued on behalf of the Applicant that the Respondent's submission that the Applicant refuses her access to the children is not sustainable. According to the Applicant's counsel the order by the Magistrate made provision for wide contact but the Respondent made no attempt to exercise it. The contention is that if the Applicant prevented contact, as alleged by the Respondent, the Respondent should have taken steps to apply for the enforcement of the Court order by applying for a contempt order.

[21] Counsel further argued that from the evidence on record it does not appear as if the Respondent had the interest of the children at heart. In support of this submission counsel referred the Court to a litany of WhatsApp messages where the children were sending messages to the Respondent requesting her to come fetch them whilst they were waiting for her outside at the gate in the cold, and she never came nor responded to those messages. It is counsel's contention that if the relief sought by the Applicant is granted, the Respondent will have a Court Order which she can enforce to get contact with the children, which is, in any event, interim.

[22] It became apparent during argument that the issue raised on behalf of the Respondent that Algeria was not a signatory to The Hague Convention, was not canvassed in the papers, and as such, the Applicant was not given an opportunity to deal with same in the papers. Counsel for the Applicant argued, further, that even if Algeria is not a signatory of The Hague Convention there are other means that the Respondent can make to have the Court Order operational in Algeria. For instance, counsel proposed that the Draft Order be amended to include a prayer that will

enable the Applicant to approach the Court in Algeria to make the Court order operational there.

[23] As regards the issue of the reports of the experts, the Respondent's concern is that she did not see or read any feedback in Dr Mashaba's report relating to the children's visit at her place, which was facilitated by Dr Mashaba, and that she was never informed about the children suffering as a result of the pending Court Order, thus, necessitating that they consult with Dr Mabasa.

[24] The issues pertaining to the doctors' reports do not take the Respondent's case any further. It is patently clear from the contents of the Respondent's supplementary answering affidavit that she does not dispute the substantive contents of both experts' reports. The fact that one of the children was taken to Dr Mabasa after the panic attack is of no moment in the greater scheme of the matter before this Court. In fact, it was responsible of the Applicant to have made certain that the child was seen by a Clinical Psychologist as soon as possible. More importantly, she was taken to one who had been treating her.

[25] Dr Mashaba was an independent Clinical Psychologist who was recommended by the Respondent. As such, the Respondent having accepted her findings and recommendations, the fact that she was not informed about the outcome of the arranged visit with the children would not be a reason for this Court to reject her report. Besides, having perused the report diligently, it can be ascertained that the doctor did provide feedback of that visit – she stated in the report that the visit went well. The submission by the Respondent's counsel that Dr Mashaba should not have mentioned such feedback in passing without relating it to her assessment of the children, carries no weight. It is also puzzling that this issue should be challenged by the Respondent because the fact that she reported that the visit went well, works, in essence, in the favour of the Respondent that her right to contact and access should be maintained.

[26] The submission by the Respondent's counsel that it was not in the interest of the children and not necessary for the Applicant to tell the children that the application has been postponed, does not hold water. This Court is, rather, in

agreement with counsel for the Applicant that at the age of fourteen and twelve, the children are mature enough to be informed of the outcome of the case concerning them as is envisaged in section 10 of the Children's Act.[3] The possibility to relocate was discussed with them and it was in their interest and it was responsible, as well, of the applicant to inform them of the outcome of the case.

[27] Dr Mashaba was employed to look into the issue of the primary residence and access, and this is what she did. The Respondent is in agreement with her recommendations which recommended that the primary residence be with the Applicant as previously ordered by the Court. Where the Applicant stays, is where the primary residence is. That, then, is the end of the case.

[28] From the contents of Dr Mashaba's report and the evidence submitted on record, this Court is satisfied that the children should remain in the Applicant's care. Both children have indicated their wish to relocate with the Applicant to Algeria. They are said to be looking forward to the relocation to Algeria and have both indicated to Dr Mashaba that they wish to travel with the Applicant and reside in Algeria. There is nothing on record that indicates that the relocation will not be in their best interest.

[29] It is trite that the court will only grant permission based on the best interests of the child. An important factor that the court takes into consideration is whether the decision by the parent to relocate is reasonable and *bona fide*. This court is of the view that the reasons of the applicant is under the circumstances of this matter reasonable and *bona fide*. The type of work undertaken by the applicant requires that he sometimes be deployed in another country. It is, also, not in dispute that this is not the first time such deployment happens. There is unchallenged evidence on record that the family has on previous occasioned resided in other countries due to the deployment of the applicant.

[30] This Court is of the view, that even though Algeria is not a party state to the Convention, there are other avenues the respondent can use to access the children if the applicant does not comply with the order of this Court. When a child is removed to a country that is not a party state to the Convention, the High Court, as

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[3] Act 38 of 2005.

the upper guardian of minor children, will have jurisdiction and the respondent will apply to such a court for the return of the children.

[31] There is no reason, none has been proffered why the costs in this matter should not be granted in favour of the successful party.

[32] In the circumstances the following order is granted:

1. The Draft Order marked “XX” is made an Order of Court.

E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

APPLICANT’S COUNSEL:	Adv. N Erasmus
APPLICANT’S ATTORNEYS:	Shapiro & Ledwaba Inc
RESPONDENT’S ATTORNEYS:	J M Masombuka Attorneys