IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

....

Case number: 22987/2015

In the matter between:

LW **Applicant**

and

DB **Respondent**

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. A number of applications have now been consolidated into one hearing concerning the proposed relocation of the mother of a four year old boy from Vanderbijlpark/Vereeniging to Cape Town.

2. This is not a matter to determine who are good and who are bad parents; which parent can better care for the child; with whom the child is happier. This is not a matter for blame or recrimination. This is a case about heartbreak - two parents who both love their child but who cannot live together and no longer propose to live in the same town. King Solomon is the first recorded exemplar of such a tragedy.

3. LW and DB were not married. However, they created a son, R, who was born on 11th November 2011. The parents separated in February 2013. Subsequent thereto, a court order was made in March 2013 to the effect that R be primarily resident with LW and that DB and R spend time together over alternate weekends and on Wednesday nights[1]. That order has been varied informally by the parents to accommodate their respective living and working arrangements which has resulted in virtually shared residency.

4. LW works in the hospitality industry. She was a restaurant manageress in Vereeniging and then, early in 2015, was offered a job in Cape Town with a very well-known gourmet restaurant which is part of a chain of superior establishments. Understandably, DB did not and does not want R to leave the Vaal area. Accordingly, LW has brought this application for the court to grant her permission to relocate to the Cape with R. By reason of this delay, the job offer to LW has changed – no longer from the one restaurant but into the head office/chain of restaurants.

5. This court sits as the upper guardian of minors. The discretion which we exercise is not circumscribed in the narrow or strict sense of the word.[2] It requires no onus, in the conventional sense, to be satisfied when we determine whether or not a child can accompany a parent who leaves the jurisdiction of this court.

THE BEST INTERESTS OF THE CHILD

6. Our courts adhere to the 'best interests' approach as they are required to do by the Constitution.[3]

7. On the papers, which include the founding, answering and supplementary affidavits as also the report emanating from the office of the family advocate, reference was made to a number of issues associated with the life, circumstances, wellbeing, activities, relationships, dependencies of R - all of which contribute to a greater or lesser extent and in isolation or in conjunction to determining his "best interests".

[1] At that time, the court ordered that the office of the family advocate prepare a report on Riley's best interests as a matter of "urgency" but that report made its first appearance on 12th October 2015.
[2] See *Bezuidenhout v Bezuidenhout* 2005(2) SA 187 (SCA [17].
[3] Section 28(2) of the Constitution.

Amongst these issues are R's attachment to both parents and grandparents, the disruption of R's bond with his father if he were to move to Cape Town, the somewhat conflicted relationship between LW and DB, the demands made on both parents to hold down employment and earn livings to support their child, the arrangements made for the care of R in both Vereeniging, Vanderbijlpark and Cape Town, the personal needs and desires of all adults involved in this issue taking into account the Constitutional acknowledgments of the rights of human dignity, freedom and equality.

8. In the unreported judgment dissenting from the majority of the court in *Ford [Appeal] supra*, I discussed the manner in which one may attempt to give meaning and content to the concept of the "best interests of the child". The majority of the court expressed no view on this issue and the Supreme Court of Appeal did not disagree therewith. It is convenient to repeat those portions of the judgment which are relevant to the issue before us today.

9. Our law has developed the "best interests of the child" approach[4] which has now been enshrined in the Constitution[5] which, in Section 28(2) proclaims that "a child's best interests are of paramount importance in every matter concerning the child". This principle has become known, in one form or another, in many national legal systems and has been recognized in international instruments.[6]

10. However, some writers suggest that the principle has yet to acquire much specific content or to be the subject of any sustained analysis designed to shed light on its precise meaning.[7] The result is that diverse interpretation may be given to the principle in different settings. I suggested that care also be taken be taken to avoid slavish adoption of such content as has been given to specific legislation or instruments since language as also constitutional, cultural, familial, social and other traditions inform contrasting interpretations[8].

11. The full complexity of the South African Constitution is continually being explored. Section 28(2) and the "best interests" principle do not represent and are not situate within a Constitution which envisages a monolithic or uni-dimensional approach

---

[4] *Fletcher v Fletcher* 1948 (1) SA 130A; *Shawzin v Laufer* 1968(4) SA 657 A; *Bailey v Bailey* 1979(3) SA 128 A

[5] Constitution of the Republic of South Africa, Act 2000 of 1993

[6] *See Bannantyne v Bannantyne (CG as amicus curiae)* 2003 (2) SA 363 CC which, at footnote 29, refers to article 3(1) of the United Nations Convention on the Rights of the Child 1989 as also article 4(1) of the African Charter on the Rights and Welfare of the Child, 1990.

[7] See for instance "The Best Interests of the Child", Alston P ed, UNICEF 1994 and articles contained therein.

[8] For instance the U.N Convention provides that the best interests of the child must be "a primary consideration" in "all actions concerning children" while the African Charter provides that it shall be "the primary consideration". In the United Kingdom , the Children's Act of 1989 provides that "the child's welfare shall be the courts paramount consideration".

reflecting a single, unified philosophy of children's' rights. There can be no specific and readily ascertainable recipe for resolving the inevitable tensions and conflicts that arise in each given situation.

12. The respective concerns and entitlements of different actors involved cannot be assumed to always be clearly defined and delineated. In different situations, other interests to be balanced may include, not only the particular child but also siblings, parents, nuclear and extended families and sometimes the local community, society and the State.

13. The "best interests" principle is used to provide a framework for addressing the entire range of major issues affecting children. The principle may be invoked in relation to and in the context of the separation of the child from the family setting, adoption and comparable practices, parental responsibility for the upbringing and development of the child, the child's involvement with the police and the justice system, the provision of housing and social services [9], access to schooling [10] and so on.

FACTS OF EACH CASE

14. The application of this general approach is necessarily dependent on the facts of each case. Tolstoy may have commented in the fictional world of Anna Karenina that "All happy families resemble one another, but each unhappy family is unhappy in its own way" but no two families can ever be identical as to their constituent members, the permutations in family dynamics or the challenges which they face. Not only is the psyche of each individual different but the context within which the family functions or malfunctions is always complex and never as expected. In *Jackson v Jackson* 2002 (2) SA 303 (SCA), the majority judgment was at pain to stress that "…each case must be decided on its own particular facts" (318H) and that past decisions provide no more than useful guidelines.

15. Thus, in *Jackson supra* the father of two young children wished to emigrate to Australia where he had no family or other connections solely for the sake of the children, one of whom was found to be an 'at risk' child. In *Godbeer v Godbeer* 2000 (3) SA 976 (W) where she had family and in circumstances where her employer was also relocating while her former husband, a South African whom she had met here, did not wish the children to leave. In *Bailey v Bailey* 1979(3) SA 128 (A) the mother of three children wished to return home to England where she wished the children to be educated while her South African husband opposed this proposed emigration. In *Cocking v Van Der Walt* (unreported judgment dated 6 August 2003, Case No.

[9] See *Grootboom supra*
[10] See *Harris v Minister of Education* 2001(8) BCLR 796 T.

7070/03 (W)) the mother of two daughters had remarried and she and her new husband decided to emigrate to England where he, and then she, had obtained employment. In *Latouf v Latouf* [2001] 2 All SA 377 T, the mother of the minor child sought and obtained employment opportunities in Australia because she was, *inter alia*, concerned about the crime rate in South Africa. In *H v R* 2001(3) SA 623 (C), the mother of a young daughter had remarried and her new husband had obtained employment in England. In *Ford v Ford* [2004] 2 All SA 396 (W) *[Ford appeal]supra* the mother of a daughter wished to return to her home in England in preference to remaining in South Africa where she had no family, had become divorced from her English husband, had been hijacked and had not obtained pension and other benefits associated with permanent employment.

16. It is immediately apparent that the majority, if not all, South African authorities on this topic have been concerned with circumstances which differ in two significant respects from the issue before this court.

    a. Firstly, they deal with the question of relocation beyond the borders of the Republic of South Africa whereas we are here concerned with a move within the Republic from the Vaal Triangle to Cape Town.

    b. Secondly, earlier decisions deal with the situation where one parent has been appointed the custodian parent by the court whereas we are here effectively concerned with joint custodians. Although the March 2013 order recorded that R was to be primarily resident with LW, it is common cause that he is now resident with both parents.

17. It is not difficult to extract guidance from earlier decisions. It is trite that all cases must be decided on their own facts. This renders the principles developed eminently flexible and capable of adaptation to varying circumstances. Relocation of parents and children, whether within or without the Republic's borders, necessarily involves continuing fragmentation of the original family unit with the associated distress of parents and children separated from each other and from familiar environments. Our courts have previously taken this into account. Further, that custodianship has been an important factor for consideration in other judgments does not mean that our courts have always so narrowly construed the opportunities for and the value of parenting that earlier judgments cannot speak to other arrangements such as joint custody [11]

[11] Most pertinently *see Jackson v Jackson* 2002(2) SA 303 SCA and *Ford v Ford* [2004]2 All SA 396 (W) [*Ford trial*] and the majority of the court in *Ford v Ford* unreported appeal judgment, Case No WLD 5001/04 [*Ford appeal*] all of which judgments did not find custodianship the decisive factor in determining the issue of relocation.

18. Most importantly, the overriding principle of having regard to the 'best interests of the children' has been enunciated and applied by our courts both prior and post the Constitutional imperative as set out in Section 28 (2) of the Constitution of the Republic of South Act 108 of 1996 which provides that "a child's best interests are of paramount importance in any matter concerning the child". Application of this overriding principle suggests that consideration and application of principles in earlier cases involving international relocations where there are custodian and non-custodian parents in dispute would not obscure the fundamental issues before us today where there is a proposed relocation by one joint custodian to another South African city.

19. The increasing numbers of relocation disputes referred to in psychological and legal literature as also in South African jurisprudence and that of other jurisdictions, is a reflection of the increasing trend of geographical mobility particularly in relation to work, coupled with a higher rate of separation or divorce after which former partners go their different ways. This seems to be one such case. The reasons for relocating within and without South Africa are endless - undertaking new employment opportunities, following a new spouse or partner, educational ambitions, desire to rejoin family [12]. In each case, the parent who is to remain behind opposes the move by reason of distress at the impending departure of the beloved child and the consequent loss of contact and the diminution of the parent-child relationship. In some cases the non-moving parent has shared parenting on the basis of equal time and responsibility while in others the involvement has been limited. Sometimes the relationship between the divorced spouses is amicable and supportive while, in other cases, the relationship is acrimonious and hostile. In many cases the bond between the parent to remain behind and the child(ren) has been found to be loving. In each case our courts acknowledge the hurt and desperation of the parent who does not plan to relocate.

PRINCIPLES APPLICABLE TO RELOCATION OF CHILDREN

20. Certain guidelines may be distilled from the Constitution, judgments of South African courts, and conventions to which South Africa is a signatory:

[12] See the discussions on the numerous motives for relocations in M Gindes in "The psychological effects of relocation of divorce" Vol 15, 1998, American Academy of Matrimonial Lawyer at 128 -131 : Bruch & Bowermaster "the Relocation of Children and Custodial Parents: Public Policy, Past and Present" (1996) 30 Family Law Quarterly at 248/9; Lowe and others "International Movement of Children: Law Practice and Procedure" (2004) Chapter 8 at 99 onwards; Braver and Ellman "Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Considerations" Journal of Family Psychology 2003m Vol 17, No 2, at pages 207-208.

a. The interests of children are the first and paramount consideration.[13]

b. Each case is to be decided on its own particular facts.[14]

c. Both parents have a joint primary responsibility for raising the child and where the parents are separated, the child has the right and the parents the responsibility to ensure that contact is maintained.[15]

d. Where a custodial 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 custodial parent is shown to be *bona fide* and reasonable.[16] [17]

e. The courts have always been sensitive to the situation of the parent who is to remain behind[18]. The degree of such sensitivity and the role it plays in determining the best interests of children remain a vexed question.[19]

<u>*Bona Fides* and Reasonableness of the Decision to Relocate to Cape Town</u>

21. The Vaal Triangle in which LW and DB currently live is presently much in the news over the dire financial position of its largest employer – Arcelor Mittal. In such circumstances it is not surprising that DB initially worked for his father in his father's business and that he now works for himself and that LW feels the need to move to a larger and more prosperous area where the hospitality industry is not on the wane.

22. WL has explained that she wishes to leave Vereeniging and move to Cape Town. She was working at the Three Sisters Lodge in Vereeniging. She was then offered a managerial job at La Cucina in Cape Town (which is a well-known restaurant frequently appearing on the Top Ten of Cape restaurants). That job had the advantage, she said, of being open only during the day to enable her to spend evenings with R. It was not only a managerial position but also offered a higher salary. By reason of DB's opposition to her departure with R to Cape Town, she has had to delay taking up this new position but her new employers have been prepared

---

[13] Section 28(2) of the Constitution. See also the full discussion in the minority judgment in *Ford v Ford (appeal) supra.*

[14] *Jackson supra* at 318F.

[15] Section 28(1) of the Constitution confers the right on every child to "family or parental care…" and this would imply an corresponding duty on the child's parents to provide such care.

[16] *Jackson supra* at 318F.

[17] In line with the decisions of the English courts (see *Payne supra*; and *in Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956,) and Australia (although the High Court has now explicitly set aside the requirement that the relocation be proven to be bona fide and justifiable (see *AMS v AIF surpra*; see also *U v U*).

[18] See *Bailey v Bailey* 1979(3) SA 128 (A); *Godbeer v Godbeer* 2000 (3) SA 976 (W); *Van Rooyen v Van Rooyen* 1999(4) SA 435 (C) at 437 G. These and other judgments are discussed a t paras 59-68 of the minority judgment in *Ford appeal supra*.

[19] For instance, contra the decisions in the other authorities referred above, in *Jackson supra*, in *Ford [trial] supra*] and the majority in *Ford [appeal] supra* found that the best interests of the children coincided with the wishes of the non-relocating parent.

to wait. They have not kept that particular position open but have offered her another position in their expanding stable. In the meantime whilst she awaits the hearing of this case, she has been working at another restaurant in the Vaal Triangle as an interim means of earning a living.

23. There are no grounds proffered on which a court could conclude that the proposed relocation of LW is neither *bona fide* nor reasonable. She seeks to improve herself, to advance her career, to earn more, to have greater job security, to move to a capital city rather than moulder in a declining former industrial centre.

24. Where the office of the family advocate concluded that her proposed relocation was "not *bona fide* and reasonable" because (using the word 'therefore') such relocation would cause R to become estranged from his father, DB, and the rest of his family, I must, with respect, point out that the office of the family advocate appears to misunderstand the concept of that which is *bona fide* and the role which it plays in this enquiry.

25. The phrase *bona fide* in intention is the opposite of *male fide* intentions i.e. the one is good faith and the other bad faith or malevolent. Nothing has been shown to be bad faith or malevolent in WL's intentions. The court is required to determine whether her proposed move is reasonable. To enable such a decision we look at the evidence pertaining to the relocation itself. Is it genuine? Does it appear rational and considered? Is the move related only to a desire to frustrate another parent or does it encompass all those facts pertaining to expansion of life, development of personal skills, advancement of opportunities, improvement of career and so on.

26. These are not questions which the family advocate appears to have taken into account. Her view appears to be based on no more than that there will be an impact on the bond between R and DB and DB's parents. This is another set of questions but do not, in this case, assist in assessing the relocation *per se*.

27. What must be understood is that we no longer live in a mindset where birth, life and death are all played out in one geographic situation surrounded by those same people who were present at each of those important milestones. People move to go to school, to study, to find a job, to follow jobs, to earn something or to earn more, to improve oneself, and to see the wider world. There is nothing unusual or sinister in such mobility. I appreciate that DB chooses to continue to live with his parents and that he sees his life and future there. He cannot be criticized for those choices. But neither can LW be castigated as *male fide* or unreasonable when she does no more than seek employment elsewhere with all that entails.

28. In all the cases to which I have referred, particularly those involving relocation to another continent or country, our courts have been astute to examine whether or not there is an income, a home, security, and support at the end of the long journey. The reason is very simple – a parent who takes a child from our jurisdiction to that of another country and is then found to be jobless and homeless would have to fall back on whatever social security may (or may not be) offered by that new destination or possibly return to this jurisdiction. But, once this journey has been undertaken, our courts have no further role to play, no assistance to offer, no interventions which can be made. We must know that a child will be cared for wherever he or she is taken before we allow that child to be removed from our jurisdiction.

29. Nothing has been offered on these papers to suggest that the relocation is undertaken without thought and planning. There is a job and a place to live in a capital city of this country which is barely 1300 km distance away.

30. The office of the Family Advocate also commented that she was not convinced that LW had considered "all the ramifications of her move" without identifying those ramifications. The court remains equally in the dark

31. I am, with respect, in agreement with the approach adopted by Nugent J in *Godbeer supra* when he stated

> "I do not think that I can, or should, consider weighing the relative merits of living in this country or living in the United Kingdom. Matters like the quality of their schooling, the relative standard of living and so forth are, in my view, quite peripheral in the present case. Whether they live in this country or in the United Kingdom, they will be properly provided for as far as housing, sustenance and education is concerned." (at 981B)

32. I can see no reason to adopt a different approach from Goldblatt J in *Cocking supra* who stated "It is not for me to decide what is the best place for people to live. This is a decision that they must make and it is not necessary and I do not intend commenting on the advantages and disadvantages of living in South Africa as opposed to living in some other country" (at page 4) or from Rumpff JA in *Shawzin supra* who commented that the children would not enjoy in Canada "…a standard of living equal to what they were used to in Johannesburg. That standard was apparently high. I do not think that to be able to live in affluence is of educative value to boys of that age; their education and happiness in these formative years depend, or should depend, on other things in life" (at 669B).

33. In short, it is not for the courts to make value judgments about lifestyle as between England and South Africa or Canada and South Africa or even Cape Town and the Vaal Triangle. The relevant issue is whether or not the child, in this case R, will be looked after.

Caring for R

34. There is nothing to suggest that R will not be well cared for wherever he lives - with either his mother or his father – in the Vaal Triangle or in Cape Town.

35. He and his mother live in a flat adjacent to that of his maternal grandparents. When he is with his father, he lives in his the home of his paternal grandparents.

36. Cape Town is the so-called 'mother city' of this Republic. Housing is available to those who can afford it. Cape Town welcomes incomers every day. LW will continue to work and she will earn a good salary. She has explained that she has arranged accommodation for herself and her child and that identified nursery school facilities are available for R.

37. Both parents have (and may continue to have) work obligations which are onerous. LW has worked at night in a restaurant whilst DB has worked night shifts in a factory. LW will now only work in the daytime. Both parents have managed to accommodate their love for and their caring for their son around these obligations.

38. Notwithstanding comments in the papers about (non) payment of maintenance and other disagreements, it is clear that arrangements for the care of R is not really the issue in dispute. The most painful issue which understandably is the source of DB's opposition to WL's relocation to Cape Town with R is that DB lives and works in Vanderbijlpark and that he would be separated from his only child with whose life he is very much involved.

39. In any event, it would not be possible for this court to decide disputes of fact, in the form of allegations and counter allegations, on the papers.

40. The only issue where there is agreement on the facts and which does cause me some concern is the difference of opinion between the parents as to R's attendance at pre-primary school. LW wants R, an only child, to attend such school on a daily basis. DB does not have that commitment and takes the view that, at that age; the children just "sit around". He feels that R does better remaining with DB's family which is "far from the school" instead of going to school and anyway "day care is not in the interests of the child".

41. I cannot determine how much of this dispute is occasioned by cost (DB maintains that he has paid what he has been required to pay) or the inconvenience of travelling the distance from DB's parents' home to the school when R is staying with DB. It is a problem. It has led to acrimony. It has caused legal correspondence.

42. It is indicative that DB is reluctant to inconvenience his life to ensure that R attends school, learns the songs and the social roles which pre-primary school offers, and participates in group and peer activities which pre-primary learning encourage. This is of great concern. If DB cannot accommodate R's need to attend pre-primary school now, at this age, and when he is living in Vanderbijlpark and the school is in Vereeniging then the court must consider how would DB respond and whether he would be prepared to assume more onerous responsibilities when R attends primary school, high school and then wants to go on to a Technikon or University or learn a trade.

R's bond with his parents

Caregivers

43. Although our courts have, usually in the absence of a custodian parent, relied on this as one relevant criteria[20], South African law has not adopted the practice of simply identifying whomsoever may be thought to be the 'primary parent' or 'primary caregiver' as determinative of the enquiry. In South African law we do not adhere to any such 'primary parent presumption'. Indeed, we adhere to no presumptions save the ultimate test of the 'best interests of the child'. As far as parenting is concerned we have long since abandoned the 'maternal preference rule'. Our courts adopt an as holistic approach as possible to the question as to what constitutes the 'best interests' of the child and how these may be ascertained

44. At the time of R's birth and for some time thereafter, LW was the primary caregiver. In March 2013 the court ordered that both LW and DB would enjoy co-parenting rights and that LW would be the primary caregiver. LW originally provided the primary residence for R but now both she and DB do so – she in a flat adjacent to her parents and DB in his parents' home.

45. Where this court is concerned with the 'best interests' of the children in the context of relocation of one parent with the children then we are required to assess the role played by each family unit and each parent in the lives of these children.

[20] See *Van Rooyen v Van Rooyen* 1999(4) SA 435 (C); *Jackson supra*.

46. Both parents work; both have worked unsociable hours and have accommodated their care of their son. Both have living parents who provide grandparents for R at very close quarters.

47. It is perhaps appropriate to refer to the important role played by grandparents. They offer emotional, physical and financial support to single parents. They provide love and guidance and much joy to grandchildren. It is frequently grandparents who assume much of the burden of looking after children whilst harassed and hardworking parents meet their other obligations. Their bond with their grandson is an important one which must be acknowledged.

48. But it is not the case on these papers that either parent is incapable of looking after R and that it is the grandparents who seek to retain a role as primary or secondary caregiver or even as relatives to whom R enjoys frequent/daily contact.

49. R is four years old. He loves both his parents. This is not a situation as in *MacCall v MacCall* 1994(3) SA 201 C, where King J summarised the authorities to the effect that:

> "If the court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of a preference a genuine and accurate of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to his expressed preference" (207 H –I)

<u>Separation</u>

50. Should LW live in Cape Town or DB move to Pretoria or one seek opportunities in Australia, then of course, R will be parted from a parent whom he loves and from whom he has known nothing but love and care.

51. Regrettably that is the nature of divorce or separation of parenting co-habitation that does not endure throughout a child's life. That is the fate of a child whose parents do not live together.

52. The solution of our courts can never be to order that separated parents must live at close proximity to each other in order that each parent lives in close proximity to a child. Our courts have not been appointed the guardians of adults and parents are not the prisoners of our courts.

53. The Family Advocate was necessarily concerned to ascertain the extent to which the proposed relocation complied with the views expressed by our courts in similar

matters and interviewed both parents. The conclusion was that relocation "will severely disrupt the minor child's (R) relationship with the respondent (DB) and can constitute a major developmental risk". With respect, the first half of the sentence is fairly obvious – R will miss his father and there will be a disruption in the father-son relationship.

54. But the second half of the sentence is, with respect, totally without foundation. No factors to make such assertion have been offered by the family advocate. What "major developmental risk" is envisaged? That parents live apart is unfortunate but we cannot assume, on the basis of the say-so of the family advocate, that all children from divorced families have sustained "developmental risk" let alone of a "major" nature. What is this risk? How does it affect development" In what manner is it major?

55. At the end of the day, the office of the family advocate has offered little assistance. A recommendation against relocation has been offered on the basis of an averment (unexplained) that the relocation is not *bona fide* and reasonable, taking into account the (undiscussed) competing advantages and disadvantages of relocation and the (quite obvious) impact on the relationship with the non-residential parent.

56. Does the family advocate propose that all separated parents must remain living adjacent or close to each other until a child attains the age of eighteen? That is the effect of this recommendation. Perhaps this is the appropriate moment to consider, in this judgment, the context within which R's best interests are to be adjudged.

The Value of Context in identifying the Best Interests of R

Interests in a Constitutional Sense

57. In interpreting the phrase "best interests" it is appropriate to have regard to the term "best" which introduces a comparative quality. The Shorter Oxford English Dictionary includes as definitions, "excelling all others in quality", "most advantageous" and "most appropriate. Two distinctions are drawn: first between that which is considered to be consonant with the child's welfare and that which is not; secondly, between those interests which are more advantageous to a child than others which are less advantageous. It may, of course, develop that a combination of factors – some neutral, some less advantageous, some more advantageous and even some seemingly disadvantageous – may together approximate or combine to form a child's "best interests".

58. Amongst the definitions of "interests", the Shorter OED includes "the relation of being objectively concerned in something by having a right or title to, a claim upon,

or a share in", "the relation of being concerned or affected in respect of advantage or detriment" and "the feeling of one who is concerned or has a personal concern in anything". There is no stipulation as to the content of these "interests". These must be seen within the whole of Section 28 of the Constitution which includes rights to name and nationality; family, parental or appropriate alternative care; basic nutrition, shelter, basic healthcare and social services; protection from maltreatment, neglect, abuse or degradation; protection from exploitative labour practices; exemption from detention except under certain circumstances; legal representation in certain civil proceedings; exemption from participation in and protection during armed conflict. R's "interests" are limited to those specified in this section since the remainder of the Constitution also speaks to children.

59. In *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) 422 CC Goldstone J wrote ,

> "the plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1). (at 428D-D).

60. There is also no stipulation as to the priority (if any) to be ascribed to any one of the child's well-being, education, physical or mental health, or spiritual, moral and social development or other interests.

61. I found it significant that the Legislature elected to identify the child's best interests as of "paramount" importance. The Shorter Oxford English Dictionary includes amongst the definitions of "paramount", "above in scale of rank or authority; superior" and also "highest in power or jurisdiction; supreme". A child's best interests is the pre-eminent consideration amongst all other considerations.[21] However, the Legislature did not intend the "best interests" of the child to be the sole or exclusive aspect to be considered because it did not prescribe that the child's "best interests" are the only factors to be considered or the sole determinant of the exercise of a court's discretion. The 'best interests' principle is the paramount consideration within a hierarchy or concatenation of factors but it is not always the only factor receiving consideration in matters concerning children [22]

[21]The uses of the definite article "the" and not the indefinite "a" is, of course, a clear indication that competing interests should not be given greater importance than the interests of a child.

[22]See, for example, in the public domain, the decision of the Constitutional Court *in Grootboom v Government of the Republic of South Africa* 2001(1) SA 46 CC where the Court took into account the need of children, inter alia, for shelter but held that socio-economic rights had to be understood in context, corresponding obligations

62. Not only does the wording of the Constitution lead to this interpretation, but all such interests are necessarily the product of and contextualised by a multiplicity of other factors which include the interests of other persons, communities and even the State. The position of each child and the interests of each child are more dependent on other persons and other considerations than are adults. This remains the case when considering the "best" as opposed to other interests.

Parents Interests

63. 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" (at para 159)

64. Context was recognised in *Godbeer v Godb*eer 2000(3) SA 976 WLD, where Nugent J commented:

> "In approaching the matter I am required to accord paramount consideration to the welfare of the children (See *Bailey's case supra*) but that is itself a relative concept which can only be judged within the context of their particular circumstances" (981 I)

65. Interpretation of a Constitutional right in its context, was held in *Grootboom supra*, to require consideration of contextual setting as also social and historical rights (at 61H-62B). Such context has, of course, been recognised by numerous judgments of our courts. One such practical instance is that alluded to by Scott JA in *Jackson supra* at 318F where he refers to the parental context within which children live and the impact upon them of living with a parent "thwarted" in implementing a decision reasonably taken.

66. "Best interests" standards are regarded as indeterminate because the phrase is, as indicated above, inherently subjective. Interpretation of the principle must inevitably be left to the judgment of the person, institution or organisation applying it. In so doing, interpretation as to what is "best" amongst a selection of "interests" creates a discretion in the power who or which makes that selection.

---

were not absolute and unqualified, there was evidently an overlap between other rights and those conferred by on children by section 28.

67. There is difficulty in identifying the criteria that should be used to evaluate alternative options open to a decision-maker seeking to act in a child's best interests.[23] The Constitution provides a number of signposts. These include the rights set out in Section 28 and, of course,

> "…the Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom."[24]

68. No one factor can be given pre-eminence in all cases involving children. The complexity of the "best interests" principle require the court to consider all factors which contribute towards ascertaining children's "best interests. It is necessary to avoid a uni-dimensional focus which fails to suggest a careful balancing of the different ingredients which may all point towards and comprise the children's "best interests".

69. Formulation of the 'best interests' of children standard must also have regard to the best interests of family relationships in particular, society generally and constitutional principles.

70. To formulate a 'best interests' of the child approach which has the effect that primary caregivers or custodian parents will always be obliged to live in close proximity to the other parent from whom they are divorced may have certain undesirable consequences for both individuals and wider society.

71. One concern would be the signal that is sent to parents and children about the constitutional values of human dignity freedom and equality. In *Van Rooyen v Van Rooyen* 1999(4) SA 435 C, the court sought to

> "apply individual justice in the sense that all the relevant factors, even the mother's fundamental right to freedom of movement, will be assessed in the context of these children's best interests" (437 H).

---

[23] Mnookin comments in "In the interests of Children; Advocacy, Law Reform and Public Policy" (New York) 1985 cited, in Alston op cit. "The choice of criteria is inherently value-laden; all too often there is no consensus about what values should inform this choice. These problems are not unique to children's policies, but there are especially acute in this context…. Even if predictions [as to the consequences of policy alternatives] were possible, what set of values should a judge use to determine a child's best interests…? [Sh]e must have some way of deciding what counts as good and what counts as bad "The choice of criteria is inherently value-laden; all too often there is no consensus about what values should inform this choice. These problems are not unique to children's policies, but there are especially acute in this context…. Even if predictions [as to the consequences of policy alternatives] were possible, what set of values should a judge use to determine a child's best interests…? [Sh]e must have some way of deciding what counts as good and what counts as bad

[24] Per Kriegler J in *S v Mamabolo (E TV and others intervening)* 2001 (3) SA 409 CC at 430 F.

72. Where this is not done, a message could possibly be sent that primary caregivers or custodian parents are "shackled" to the other parent. Such message suggests that primary caregivers or custodian parents lose an independent right to "freedom of movement" and accordingly a vast conspectus of the attributes of "dignity" is denied them as well. South African judgments have explicitly accepted that formerly married persons are and should be free to create their own lives post-divorce untrammeled by the needs or demands of the former spouse[25] .

73. The majority of the High Court of Australia in *AMS v AIF; AIF v AMS* (1999) 199 CLR 160 restated that the statutory instruction to treat the welfare or best interests of the child as paramount does not mean that the legitimate interests or desires of the parents ought to be ignored, the "legislation being enacted in a society which attaches a very high importance to freedom of movement and the right of adults to decide where to live "and, commenting on the former requirement to demonstrate 'compelling reasons' to justify relocation, stated

> "It effectively ties that parent to an obligation of physical proximity to a person with whom, by definition, the personal relationship which gave rise to the birth of the child has finished or at least significantly altered".

74. South African law has over the years been developing towards the proposition affirmed in *Jackson v Jackson* 2002(2) SA 303 SCA that:

> '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' (per Scott JA at 318F).

75. The majority in *Jackson supra* approved a rationale behind this general principle that in most cases:

> '... 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'. (at 318 G)[26]

76. This approach was foreshadowed in the line of reasoning set out in *Godbeer v Godbeer* 2000(3) SA 976 WLD[27] :

---

[25] See for instance *Godbeer supra* already quoted and others to similar effect.

[26] One instance of the adverse consequences upon children which would result from frustration of the endeavour of the custodian parent is that suggested in *Jackson* (at 318 G) where children would be exposed to the '… bitterness and frustration which would adversely affect the children'

[27] See also *Ex Parte Critchfield* 1999(3) SA 132 (W); *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C);; *H v R* 2001(3) SA 623(C)114 ; *Heynike v Roets* 2001(2) Al SA 79 (C) 154; *Cocking v Van Der Walt* (unreported judgment dated 6 August 2003, Case No, 7070/03 (W)) 168.

> "Undoubtedly, the welfare of all children is best served if they have the good fortune to live with both their parents in a loving and united family. In the present case that was not to be. The respondent and the applicant considered that it was in the best interests of themselves, and no doubt the children, that they should live separate lives, thereby anticipating that their lives might take them on different paths. I do not think that the applicant can be expected to tailor her life so as to ensure that the children and their father have ready access to one another. That would be quite unrealistic. The applicant must now fend for herself in the world and must perforce have the freedom to make such choices as she considers best for her and her family.' (Per Nugent J at 981J-982C).

77. I am, with respect, in agreement with Kriegler J when he said in *President of the Republic of South Africa and another v Hugo* 1997(6) BCLR 708 CC that

> "One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities" (at 743F).

78. Further, one should not lose sight of the fact that primary caregivers or custodian parents are most frequently the mother. 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….". (per Goldstone J in *Hugo supra* at 727G).

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 custodian parents to remain resident where the other parent chooses to be resident. But discrimination which is unintended or unforeseen or even made in 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.

80. One should also be mindful that primary caregivers or custodian parents (intending or wishing to relocate) may choose not to foster loving relationships and close bonds between children and the other parent. Primary care givers or custodian parents may deliberately encourage a weakening of the relationship between children and the other parent in order to facilitate easy relocation. This particular appellant may have served her own interests far better (and selfishly) by not agreeing to increase the access by DB to R. If she had not done so, she and R may not have been put through the litigation ordeal which has taken place

81. WL and perhaps R could not but fail at some time or another to experience and to express feelings of bitterness and frustration at what had happened. Scott JA in *Jackson supra* was alive to this consideration when he commented that

> "...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'. (at 318 G).".

82. These concerns are not unique to South African courts. In *P (LM)(otherwise E) v P (GE)* [1970]3 All ER 669, Lord Justice Winn commented that "I am very firmly of opinion that the child's happiness is directly dependent not only on the health and happiness of the mother but on her freedom from the very likely repercussions, of an adverse character, which would result affecting her relations with the stepfather and her ability to look after her family peacefully and in a psychological frame of ease , from the refusal of the permission to take the child to New Zealand." while Lord Justice Sachs commented that non relocation desired by a parent "...is the sort of sacrifice that ought not to be accepted by this court, for the very reason that it may well in the long term endure to the detriment of the child".

83. In *Payne v Payne* [2001] EWCA Civ 166, [2001]Fam 473, [2001] 1 FLR 1052, one of the questions the court said ought to be asked was "What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?" and referred to the importance which the English courts attach to "the emotional and psychological well-being of the primary carer", stressing that in any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor. In *Re B (Leave to Remove:Impact of Refusal)* [2004] EWCA Civ 956, the headnote reads that the Court of Appeal held that it was necessary to make a full and careful assessment of the consequence to the mother and her present husband of a refusal of the application and to set that in the scale against the inevitable detriment to children in the loss of regular and frequent contact with the absent parent. It was important to give great weight to the emotional and psychological well-being of the primary carer, not merely to take note of the impact on the primary carer of a refusal

"Trauma"

84. The Family Advocate found that R would be "most negatively impacted on" were he to be separated from DB and his grandparents. She even went to so far as to include separation from unnamed friends in this category of separation with adverse consequences. Although the word "trauma" was used by the family advocate no such trauma was identified or explained that would be occasioned by moving to Cape Town.

85. This is, regrettably, neither the first nor the last time in which a court is required to consider the impact on a parent and his or her child if and when such parent and child live apart or the parents divorcing or separating. That relationship is disturbed whether the parent and child now live in different homes, different towns or cities, different provinces or even different countries. Our courts have always been sensitive to the plight of both child and the parent with whom the child is no longer resident.

86. In *Shawzin supra*, the then Appellate Division accepted that such separation would be a "severe blow" to the non-custodian parent and that it would also be a loss to the children who would no longer have the non-custodian constantly near them. However, the court found that there would however be "a compensation" because the bond between the children and the non-custodian parent would not be broken by reason of long holidays and opportunities to visit each other. In *Bailey supra*, the majority judgment described the result of the removal as being a "drastic curtailment" of the rights of access of the non-custodian parent and that the children would be denied the undoubted advantage of being in close contact with such parent during their adolescence. However, the court did not anticipate a complete break in the relationship between this parent and the children, as opportunities to visit from time to time in each country would "offset the hardships" likely to flow from such relocation. In *Van Rooyen supra*, the court was mindful of the "further disruption" to children who would be deprived of frequent contact with the non-custodian parent but took the view that the position could be palliated and the disruption to the children minimised by the generous access proposed. In *H v R supra* there was evidence as to the potential deterioration in the bond between father and children and even argument as to "trauma" which may be experienced but the court held that "adaptation" would take place.

87. It would appear that our courts do not usually, in the circumstances of each case, regard the effect of the removal of children on the non-custodian parent's relationship with those children as "conclusive of the issue" (per Trengrove JA in *Bailey supra* at 145A).

88. As was pointed out in *Van Rooyen supra* :

> "It is trite that the interests of the children are, all else being equal, best served by the maintenance of a regular relationship with both parents. Sadly, however, children of divorced parents do not live in an ideal, familial world and the circumstances necessitate that the best must be done in the children's interests to structure a situation whereby access by the non-custodian parent is curtailed, that contact between him and the children is effectively preserved" (439 H – I)

89. R has been exposed to a non-ideal situation of change, dislocation and disruption throughout his life. Initially he lived with both parents. They then separated. He lived with LW alone. Then he started living with both LW and DB. He is a small boy who has not had the benefits of one happy family but has, over time, learnt to live in and adjust to living in two extended families.

90. This is a classic example of the "best interests" of the R being no more than an attempt to ameliorate a difficult and undesirable situation. The 'best' situation disappeared when the intimate relationship between LW and DB ended and they decided to become separated.

Access by R to his father and DB's access to R

91. There are a number of proposals on the table from LW as regards DB and R enjoying access to each other.

92. The nursery school has closed circuit television which the parents can monitor. R and DB can telephone and skype. R can fly to the Vaal Triangle on a regular basis – LW will both accompany him and pay for these travelling costs. This obviously has the added advantage that she can see her parents and R can see both sets of grandparents. R can spend school holidays with DB.

93. The family advocate took the view that R will never grow beyond the age of four years old in that he was "too young" to have a telephone conversation with DB. She also was concerned with the high costs of travelling from Cape Town to Gauteng.

94. I do not think it is the business of either the family advocate or this court to be concerned about the 'high costs' of travel. What we should be concerned about is the disruption to R's life if he travels backwards and forwards every second month to the Vaal Triangle. He will miss school friends' birthday parties, he will leave his home, and he will not play with his neighbours and friends as he will forever be on

the move. It is difficult to see how R will put down roots, integrate into his school and his neighbourhood if he endures a lengthy outwardbound and then return journey to the Vaal on a frequent basis.

95. Perhaps it will be time for DB to leave his comfort zone, travel to Cape Town and see where R lives, goes to school, plays with his friends and eventually plays sport and participates in school activities.

96. Of course all children, including R, would prefer to maintain regular physical face to face contact with the absent parent and vice versa. As has been pointed out in other judgments, contact does not today have to be exclusively physical or face to face and can include telephonic, internet, photographic, filmed and intermittent physical contact.[28]

97. Relocations often have major repercussions for the children relocating and the parent who remains behind. Nevertheless, even in those cases the 'severe blow"[29] to, the "drastic curtailment" of[30] or the "further disruption"[31] of the access of the parent who remains to the children has usually been ameliorated by suitably considered revised access arrangements as children, such as R, grow and develop other capacities and interests.

CONCLUSION

98. Of course, the ratio in *Ford (trial) supra* is correct where the court *a quo* cautioned that a relocating parent cannot pay "scant regard to the fact that the access which the children would have to their father would be seriously curtailed… A major consideration should be the consequence of interrupting a close psychological and emotional bond which a child has with the non-custodial parent". With this reasoning the majority of the court in *Ford (appeal) supra* could find no fault and concluded "This imposed an obligation on the appellant to place this factor at the forefront of her decision to relocate".

99. It seems beyond doubt that R has close emotional bonds with both his mother and father and grandparents.

---

[28] However, the cost of insisting upon physical contact "is to impose serious deprivations upon the human rights of custodial parents who are mostly women. To take the contrary view is to entrench gendered social and economic consequences of caregiving upon women in a way that is contrary to the Convention on the Elimination of All Forms of Discrimination against Women to which Australia is a signatory." Per Kirby J in *U v U* [2002] HCA 36

[29] *Shawzin supra* at 669A

[30] *Bailey supra* at 144G

[31] *Van Rooyen supra* at 439F

100. The interactions between the parents, LW and DB, are not without mistrust and acrimony but neither is an unsafe, unsuitable or inappropriate parents with whom R should live or with whom he should spend time.

101. I find that the proposed relocation of LW to Cape Town to be genuine, reasonable, undertaken for purposes associated with the best possible interest of herself and her son, are actuated by *bona fide* intentions and not intended as a ruse to strip DB (or his parents) of the time spent with each other or a subterfuge to remove R from DBs parenting contribution.

102. I find that the primary residence of R is LW and I find LW to be the primary caregiver of R.

103. I find that any separation of four year old R from his mother would far outweigh any other consideration which has been placed before this court.

104. I find that no factual basis has been laid to establish that R would suffer "trauma" in the event of his moving to Cape Town with his mother.

105. There will be a change in DB's contact with and access to his son as a result of R's relocation to Cape Town. This will cause DB much pain and can cause R some anxiety. Although the access tendered by the LW applicant recognises the important role played by DB in the life of R, I cannot find that it is in R's best interests to travel on such a frequent basis from one province to another to visit his father. When he is older and able to travel alone and able to make his own accommodation to his school and sports and social life without distress, then such travel may be used to ameliorate the situation. In the meantime, DB and his parents can, of course, travel to the Cape and spend time with R.

MAINTENANCE

106. I am not in a position to make a determination on the outstanding maintenance disputes – whether or not DB has or has not paid the pre-primary fees, the monthly maintenance or has kept R on his medical aid.

107. In the circumstances of the order I shall make, it seems appropriate that DB pay one half of the costs of R's attendance at pre-primary school, primary school and thereafter. That includes fees, uniforms, books, stationery, school outings and extra murals. LW should submit an invoice to DB in respect of these regular costs and DB should make the appropriate stop order in her favour for monthly payments.

COSTS

108. I was unimpressed with the tone and import of the correspondence emanating from DBs representatives and the pleadings to which he attested. He has been unsuccessful in his opposition to this application.

109. However, parents act out of love and not common sense. DB and his family are obviously distressed. I regret that both parents, who can ill afford it, have had to incur legal expenses. I do not propose to penalise DB in his opposition.

ORDER

An order is made as follows:

1. The application brought by LW Wolter to take her son R Wolter to live with her to Cape Town is granted.
2. The order granted by this court on 6th March 2013 be varied in respect of the respondent, DB Bensch, rights of reasonable contact to the minor child R Wolter as follows:
    a) Each alternate weekend in Cape Town after closure of pre-primary school on Friday until 18h00 on Sunday evening.
    b) Included in the above, is contact one weekend every second month, after school on a Friday until Sunday evening, which contact may be exercised in the Vaal Triangle. The applicant shall pay the travel costs of the minor child to the Vaal Triangle and may accompany the child.
    c) The order endures until such time as the minor child, R Wolter, enters grade I at primary school when the question of timing and location of access shall be revisited.
    d) One-half of each school holiday, alternate Christmas and alternate Easter festivities. Respondent, DB Bensch, shall pay the travelling and other costs associated with any travel of the minor child, R, when exercising contact during these holidays.
    e) Daily but reasonable telephonic, skype/face contact with the minor child, R Wolter, at times agreed and pre-arranged between both Applicant and Respondent.
3. The order granted by this court on 06th March 2013 be varied in respect of maintenance only insofar as it is ordered that Respondent, DB Bensch, shall pay to Applicant, LW Wolter, one-half of all educational costs incurred for and on behalf of R including school fees, uniforms, books and stationery, school outings and extra murals; and
4. Each party shall pay their own costs.

DATED AT JOHANNESBURG 16TH NOVEMBER 2015

SATCHWELL J

Counsel for Applicant: Adv Meyer
Attorneys for Applicant Esthe Muller Inc
Counsel for First Respondent: Adv Broodryk
Attorneys for First Respondent: BMH Attorneys
Dates of hearing: 05 and 06 October 2015 and 09 November 2015.
Date of judgment: 16 November 2015.