REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **2025-038564**

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

8 April 2025
DATE SIGNATURE

In the matter between:

H[...], S[…] B[…] Applicant

and

THE HONOURABLE MAGISTRATE MNCUBE N.O. First respondent

H[…], S[…] A[…] Second respondent

JUDGMENT

HA VAN DER MERWE, AJ:

[1] In this application the applicant seeks, on an urgent basis, an order permitting her to relocate with her daughter (the minor) to KwaZulu-Natal. The second respondent is the minor's father. The applicant also seeks an order reviewing and setting aside an order made by the first respondent on 10 January 2025, sitting as the presiding officer in the children's court in Randburg.

[2] After a marriage of 20 years, the applicant and the second respondent were divorced on 17 March 2023. One of the children born of their marriage is an 11-year-old girl (the minor). The interests of the minor lies at the heart of this application. Other children were born of the marriage between the applicant and the second respondent, but as they have attained majority age, they do not engage the attention of this Court.

[3] When the applicant and the second respondent divorced, a settlement agreement was made an order of court. This settlement agreement provides for the minor's primary residence to be with the applicant.

[4] Following their divorce, the applicant and the second respondent both resided in Johannesburg.

[5] The applicant first mooted her desire to relocate to Durban in February 2024. There was mention at a time of the applicant's intention to emigrate to Dubai, but that has fallen by the wayside. The applicant's intended move to Durban is a matter that, in terms of the settlement agreement, requires the second respondent's consent, or an order of a competent court.

[6] When the applicant and the second respondent could not reach agreement on the applicant's intended relocation, they agreed to appoint two parenting coordinators, Prof Madeleen De Jongh and Ms Linda Nell. The parenting coordinators rendered a report on 24 May 2024 in which they concluded that the applicant should be permitted to relocate to Durban, but only at the end of 2024, so as to enable the minor to adjust to the idea of her moving to Durban. The parenting coordinators urged the second respondent to "refrain from trying to convince [the minor] to stay with him in Johannesburg as this would cause her to split even further…"

[7] At the instance of the parenting coordinators, Dr Ronel Duchen was mandated to produce a "*voice of the child*" assessment. She did so and rendered her report on 21 May 2024. The parenting coordinators considered Dr Duchen's report in their report.

[8] In reaction to the report of the parenting coordinators, the second respondent instituted proceedings in the children's court sitting in Randburg, on 31 May 2024. The second respondent sought an order that primary residence of the minor should be bestowed on him, although he concedes that, so long as she remains in Johannesburg, the minor's best interests indicates that primary residence should be with the applicant. The proceedings instituted by the second respondent is described in the founding affidavit as "… a cynical ploy to prevent [the applicant's] relocation with [the minor]." To be sure, there is an ostensible contradiction between the second respondent seeking an order for primary residence with him, while at the same conceding that the primary residence should be with the applicant. Yet, in my view, the second respondent's application was prompted by the report of the parenting coordinators in which the minor relocation to Durban is recommended, albeit at the end of 2024. Also, if it was taken for granted that the applicant would relocate to Durban, as she made clear was her intention, then the order sought by the second respondent is placed in its proper context.

[9] The applicant then instituted a counter-application in the children's court in which she sought an order that she be permitted to relocate with the minor to Durban.

[10] On 18 June 2024, the children's court directed that the family advocate should render a recommendation. At the same time an order was made that the parenting coordinators should be reappointed. The application was postponed to 19 August 2024, to allow the applicant and the second respondent to explore a settlement of their disputes. No settlement was achieved, although the parties had engaged each other on the matter.

[11] When the application again served before the children's court on 19 August 2024, the family advocate's report was not complete and the matter was postponed to 29 November 2024. The family advocate was ordered to render a report by 25 November 2024.

[12] During September 2024 the applicant laid a charge of theft against the second respondent. This is said to relate to stock the second respondent stole from the applicant's business that led to the applicant laying a charge against the second

respondent in 2022, when the applicant and second respondent were still married to each other, but presumably estranged. Following the second respondent's undertaking to make payment for the stolen stock, the applicant states that she withdrew the charges.

[13] According to the applicant, in retaliation for the charge of theft, the second respondent had his wife lay charges against the applicant of intimidation and extortion. A charge of sexual abuse was laid against the applicant's husband. These charges were laid later on the same day that the applicant laid the charge of theft.

[14] The applicant also states that she received threatening phone calls from the second respondent's employees. She also alleges that the she and her husband were followed around by the second respondent's employees. These allegations are denied in the answering affidavit.

[15] Following these events, the applicant states in the founding affidavit that "[w]e moved to Durban" – a reference to the unlawful removal of the minor from Johannesburg to KwaZulu-Natal on 6 September 2024. The removal prompted the second respondent to launch an urgent application in this Court (on 12 September 2024), for the return of the minor to Johannesburg.

[16] A vehicle that either the applicant or her husband used was in the applicant's husband's possession. The police are said to have mistaken the applicant's husband's brother for him, with result that his brother was arrested. The applicant and her husband were made to believe that if they returned to Johannesburg, that they would be arrested, but that bail would not opposed. They returned to Johannesburg, were arrested, but as the person with whom it was arranged that bail would not be opposed was away on holiday, bail was indeed opposed, with the result that the applicant spent four nights in prison and her husband six.

[17] While the applicant and her husband were in prison, Marcandonatos AJ made an order in the urgent application brought by the second respondent following the applicant's unlawful removal of the minor to KwaZulu-Natal on 6 September 2024. Marcandonatos AJ's order was handed down on 26 September 2024.

[18] The applicant complied with Marcandonatos AJ's order. Once they were back in Johannesburg, the second respondent with the assistance of the police came to the applicant's home, the minor was taken from her care by the sheriff and for a month the applicant had no physical contact with the minor. According to the applicant, the applicant's absence was traumatic for the minor. It was required of the applicant to bring an urgent application of her own to have the minor returned to her. Such an order was granted in the applicant's favour on 24 October 2024.

[19] During this time the second respondent laid another criminal charge against the applicant, this time for contempt of court.

[20] In the meantime the second respondent brought an urgent application in the Children's Court for an order compelling the applicant to provide certain of the minor items to the second respondent. An order was made in this urgent application on 8 October 2024, ordering the applicant to provide the items concerned. The applicant complied with this order.

[21] The family advocate's report was produced on 25 November 2025 and when matter came before the Children's Court on 29 November 2024, it was postponed to 6 January 2025.

[22] On 10 January 2025 the first respondent made the order that is the subject matter of the applicant's review application. The first respondent made the following order:

> "The recommendations of the family Advocate dated 25/11/2-24 … are made an order court.
>
> Matter referred to Living Links for an intake & consolidation of all reports on the Best interests of the minor with regards to [the] relocation of [the applicant]."

[23] According to the second respondent's answering affidavit, Living Links is a "wellness company who appoint private social workers to conduct socio-emotional child [assessments]".

[24] One of the conditions under which the applicant was able to secure bail was that she was not permitted to travel. That condition was relaxed on 28 February 2025, so from that date onwards, she is permitted to travel to Durban.

[25] According to the applicant, the second respondent does not comply with his obligation to pay maintenance for the minor. The applicant managed to extract payment of maintenance from the second respondent, but only after she had to have writs of execution issued against him.

[26] In the founding affidavit the applicant sets out the particulars of the arrangements that had been made for the minor in Durban, if she were to be permitted to relocate there. The address of the freestanding home bought by the applicant and her husband, where the minor with live with the applicant and her husband is provided. It is said to be close to the minor's grandparents and extended family. The home has space for the minor's pets and she will have her own room. Arrangements have been made for her to attend a private school, under the helm of the same organisation as the school she currently attends in Johannesburg. The applicant's entire family regularly gather at her parent's home on Fridays. The applicant intends for the minor to integrate with the extended family. The minor's grandparents are involved in the raising of their grandchildren and the plan is for the minor to fit in with this tradition. The entire extended family all reside within a radius of 5km from each other.

[27] The applicant's case for urgency is lacking in some respects. However, as the matter involves the interests of a minor child, my view is that the application is sufficiently urgent to warrant its enrolment in the urgent court, if only just. For purposes of urgency I am to make the initial assumption that the applicant has a sound case on the merits (*Twentieth Century Fox Film Corpn v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) 586G). On that assumption, it would not be in the interests of the minor that the proceedings in the urgent court should proceed, when the order of 10 January 2025 is liable to be reviewed and set aside. If this matter is to be heard in the ordinary course, the proceedings in the children's court will run in parallel to this application, which will all be for nought, on the initial assumption that the order of 10 January 2025 should be reviewed and set aside.

The application for the review of the order dated 10 January 2025

[28] Ultimately, the applicant is after an order permitting her to relocate to Durban with the minor. However, so long as the order of 10 January 2025 remains in place, such an order is not available to her.

[29] No court has the substantive jurisdiction to make an order that the law does not permit. Wallis JA found as follows in *Morar NO v Akoo* 2011 (6) SA 311 (SCA) para 19:

> "Once the court is asked to go beyond this [enforcing the parties' contractual obligations] it is necessary to identify a source of its power to do so. That is central to the rule of law that underpins our constitutional order. Courts are not free to do whatever they wish to resolve the cases that come before them. The boundary between judicial exposition and interpretation of legal sources, which is the judicial function, and legislation, which is not, must be observed and respected. In this case no such source was identified."

[30] The Constitutional Court found as follows in *Department of Transport and others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at para 197:

> "In any event *Motala* dealt with a different issue. There, Kruger AJ, sitting in the High Court, was found to have lacked jurisdiction to appoint judicial managers. The order was treated as a nullity because it purported to exercise power that was specifically assigned to the Master by legislation. In the present matter, Mabuse J clearly had jurisdiction to hear the case. As explained in *Tsoga*, *Motala* is only authority for the proposition that <u>if a court 'is able to conclude that what the court [that made the original decision] has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded</u>'. This is a far cry from the inference that any court order that is subsequently found to be based on an invalid exercise of public power can be ignored." (underlining added and footnotes omitted)

[31] The focus therefore ought to be on the enabling legislation, that is the Children's Act 38 of 2005. In terms of section 62 of the Act:

> "(1) A children's court, for the purposes of deciding a matter before it or any issue in the matter, may order, if necessary, that a designated social worker,

family advocate, psychologist, medical practitioner or other suitably qualified person carry out an investigation to establish the circumstances of-

(a) the child;

(b) the parents or a parent of the child;

(c) a person who has parental responsibilities and rights in respect of the child;

(d) a care-giver of the child;

(e) the person under whose control the child is; or

(f) any other relevant person.

(2) A person referred to in subsection (1) may, subject to section 63 (1) and (2)-

(a) obtain supplementary evidence or reports from other suitably qualified persons;

(b) be required by the court to present the findings of the investigation to the court by-

(i) testifying before the court; or

(ii) submitting a written report to the court."

[32] Other provisions of the Act provide for similar orders (sections 46(1)(j) and (k), and section 50(1)) but none are as comprehensive as section 62.

[33] Section 62 allows for the children's court to order an "investigation to establish the circumstances of…" the child in issue, the parents of that child and other persons. That can only mean the gathering of facts, whether that is done by interviews with a relevant person, inspections in loco or the like. That is not to say that the opinion of the person performing the investigation is not implied, but in the first instance, the section is concerned with a factual investigation. The "consolidation" of reports by other experts is not an investigation in this sense. It is far from clear what exactly the first respondent had in mind when he ordered the "consolidation", but whatever it means, it does not imply an independent investigation into any facts. Presumably the first respondent had in mind that

Living Links should assess the reports of the other experts and draw from those a single conclusion. The assessment of the reports placed before the children's court is the function of that court. Section 62 does not permit the children's court to appoint an expert to perform its constitutional and statutory functions.

[34] Section 62, for purposes of this judgement, does not raise a particularly challenging interpretative question. The rules on the interpretation of statutes cannot (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC)) in my view, yield a result that permits the children's court to order another person to perform the very function for which it is created.

[35] Accordingly, the first respondent had no jurisdiction to order that Living Links or anyone else for that matter, should "consolidate" the reports that were before the children's court. The order of 10 January 2025 is therefore a nullity.

[36] It does not seem to matter that the order of 10 January 2025 was given in proceedings before the children's court that are incomplete. A nullity should not be permitted to stand and the parties should not be made to participate in such proceedings.

[37] There is another jurisdictional difficulty with the order of 10 January 2025. The persons who may be ordered to perform an investigation in terms of section 62, are invariably experts or a suitably qualified person. The purpose of the section to this extent is clear: the children's court may have regard to the opinion of an expert who is qualified to express an opinion on, in the present context, the circumstances of a minor child. The identity of the particular individual is therefore important, because that individual must have one or the other expertise or suitable qualification. It must therefore follow that an organisation (or legal person) cannot be appointed in terms of section 62. Only a natural person can. To this extent also the order of 10 January 2025 is a nullity as the first respondent had no jurisdiction to appoint an organisation such as Living Links.

[38] Because the order of 10 January 2025 is a nullity, it is not reviewable. It is nonetheless appropriate that an order should be made to that effect.

[39] The second respondent contends that the issues before this court are lis pendens the proceedings in the children's court. However, since the applicant withdrew her counter-application in the children's court for her to be permitted to relocate to Durban with the minor, the relocation application before me is not lis pendens.

[40] As there is no pending application in the children's court for an order permitting the applicant to relocate to Durban with the minor, it is not appropriate refer the matter back to the children's court for a reconsideration of that issue.

[41] As the order of 10 January 2025 does not stand in the applicant's way, and as the matter should not be referred back to the children's court, the next question is whether the order she seeks permitting her to relocate to Durban with the minor should be granted.

The relocation application

[42] It seems to me that the family advocate's analysis of the matter is on point, at least so far as it goes. There can be little doubt that, if taken in isolation, the best outcome for the minor is for her to remain in her mother's primary care, in Johannesburg. That way her father's role in her life remains unaffected and the upheaval that inevitably comes with a move from one city to another is avoided.

[43] To some extent the applicant's founding affidavit supports the family advocate's conclusion. In the founding affidavit the applicant states that the second respondent "… is aware that by opposing [the minor's] relocation, he is also preventing my move to Durban as he knows that I have always been [the minor's] primary caregiver and would never leave without her." Moving to Durban without the minor is not an option for the applicant.

[44] The extent of the role of the second respondent in the minor's life is not seriously disputed. He has regular contact with her and her relationship with her father is important to her. That in large part underpins the family advocate's report. One of the main reasons why, according to the family advocate, the minor should remain in Johannesburg, is to maintain the nature and the extent of the minor's contact with the second respondent.

[45] The applicant makes the point that she is responsible for the major, substantive aspects of the minor's upbringing, such as her health care, attention to her schooling, her intra- and extra mural activities, assistance with homework and the like. From Dr Duchen's report, it is evident that the minor sees the applicant as her primary caregiver. There is nothing in Dr Duchen's report that in any way suggests that the applicant is not suitable to fulfil the role of the minor's primary caregiver or that primary residence should not be with the applicant.

[46] The second respondent's role is limited to less serious matters, such as them watching television, enjoying "memes on social media" and taking trips together. That is not to say that the second respondent's role in the minor's life is unimportant to her. I am satisfied that the minor is significantly better off having her father in her life than not. Any order that I may make, should not lightly reduce the role of the second respondent in the minor's life.

[47] Although it seems to me that the family advocate's assessment is sound, so far as it goes, it does not answer the question that confronts me. In *F v F* 2006 (3) SA 42 (SCA) it was found:

> "[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 properly been awarded custody to choose in a reasonable manner how to order his or her life. Thus, for example, in *Bailey v Bailey*, the Court, in dealing with an application by a custodian parent for leave to take her children with her to England on a permanent basis, quoted - with approval - the following extract from the judgment of Miller J in *Du Preez v Du Preez*:
>
> '[T]his is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside; indeed, the Court takes upon itself a grave responsibility if it decides to override the custodian parent's decision as to

what is best in the interests of his child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian parent's decision and the emotions or impulses which have contributed to it.'

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

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

[11] From a constitutional perspective, the rights of the custodian parent to pursue his or her own life or career involve fundamental rights to dignity, privacy and freedom of movement. Thwarting a custodian parent in the exercise of these rights may well have a severe impact on the welfare of the child or children involved. A refusal of permission to emigrate with a child effectively forces the custodian parent to relinquish what he or she views as an important life-enhancing opportunity. The negative feelings that such an order must inevitably evoke are directly linked to the custodian parent's emotional and psychological well-being. The welfare of a child is, undoubtedly, best served by being raised in a happy and secure atmosphere. A frustrated and bitter parent cannot, as a matter of logic and human experience, provide a child with that environment. This being so, I cannot agree with the views expressed by the Full Court that 'the impact on S of the appellant's feelings of resentment and disappointment at being tied to South Africa, or the extent to which her own desires and wishes are intertwined with those of S' did not deserve 'any attention' and that '[i]n arriving at a just decision [a Court] cannot be

held hostage to the feelings of aggrieved litigants'." (footnotes omitted and underlining added)

[48] Satchwell J's judgement (writing for a full court) in *B v M* [2006] 3 All SA 109 (W) is instructive:

> "[40] Our courts adhere to the " best interests" approach as they are required to do by the Constitution. Our courts have emphasised the importance to the child of continuity in the child's primary relationship, usually the custodian parent.
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> [41] South African law has over the years been developing towards the proposition affirmed in *Jackson v Jackson* 2002 (2) SA 303 (SCA) that
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> > "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)
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> [42] The majority in *Jackson (supra)* approved a rationale behind this general principle that in most cases
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> > " . . . 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 318G).
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> [43] This approach was foreshadowed in the line of reasoning set out in *Godbeer v Godbeer* 2000 (3) SA 976 (W):
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> > "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"" (footnotes omitted)

[49] Inherent in a move from one city to another is upheaval for a minor child, which, generally, can be expected to have disruptive consequences for the child, such having to enrol in a new school, severing ties with friends and so forth. To expose minor children to such disruption is generally not in their best interests. Our courts do not however take such a narrow view of the best interest of minor children. There is measure of deference shown for the decision of a parent with whom primary residence lies, for the reasons explained in *F v F*. Had the best interest of a minor been the only and absolute criterion, viewed in a narrow sense, the enquiry would start and end with a comparison between the circumstances of the minor, if the parent with whom primary residence lies were not to move, and the minor's circumstances if the move were to take place.

[50] It appears to me that the arrangements that have been made for the minor in Durban is adequate. Without a doubt, the minor will be exposed to a disruption in her life if she is to move to Durban, but that is not such as to prevent the applicant from relocating with the minor, in and of itself. The report by the parenting coordinators support this view.

[51] That is not however the end of the enquiry. The second respondent's contention that the applicant's intended relocation is motivated by her aim of diminishing his role in the minor's life remains to be considered. The events surrounding the applicant's unlawful removal of the minor from Johannesburg also deserves attention.

[52] In this case, the ultimate issue is an evaluation of which one of three outcomes is in the minor's best interests: (a) I could dismiss the applicant's application for leave to relocate to Durban, which would leave the minor in her care, but in Johannesburg; or (b) I could grant the applicant's application for leave to relocate, the minor would then remain in the applicant's primary care, but the second respondent's access to and role in her life would be reduced in a material

way; or (c) I could refer the matter to oral evidence. Each outcome has commending features but is also detrimental in one way or another.

[53] The applicant's decision to relocate to Durban is, so Ms Bezuidenhout (who appeared for the applicant) argued, motivated by her desire to place geographical distance between herself and the second respondent.

[54] If the applicant's intention to move to Durban is motivated by her desire to reduce as much as she can the role her father plays in the minor's life, for its own sake, then it seems to me that I should dismiss the applicant's application for leave to relocate to Durban. If I were to come to that conclusion, then it would render the applicant's intended relocation to Durban mala fide.

[55] No matter how critical one might be of the manner in which the applicant went about matters, it does not mean that her desire to move to Durban is for that reason insincere or actuated by malice directed at the second respondent. The applicant's intended move to Durban is not irrational. Her family is based there. People are attached to their extended families in greater or lesser degrees. The applicant (and for that matter the second respondent) fall within the category of those who integrate their own lives with their extended families. That in and of itself makes the move to Durban rational.

[56] It also seems to me that the applicant's aim of placing distance between herself and the second respondent is a worthwhile one. The applicant and the second respondent share an unbreakable bond in that they are the minor's parents, but that does not mean that they would not benefit from having less to do with one another rather than more. Any conflict between the applicant and the second respondent is ultimately to the detriment of the minor. Both the applicant and the second respondent had the other arrested. I am in no position to gauge whether the charges laid by the applicant or the second respondent were well-founded or malicious, but, in all events, it is not good for the minor that either of her parents engage the attention of the police or the criminal courts. If the risk of future criminal proceedings are diminished by the applicant's move to Durban, then it would serve a rational, worthwhile aim.

[57] Ms Segal (who appeared for the second respondent) argued that the employment the applicant's husband secured for himself in Durban is not a promotion, but one equal to his previous employment in Johannesburg. The fact that the applicant's husband did not depose to an affidavit in which he explained what motivated him to accept the position he did in Durban, is a shortcoming in the applicant's case, as Ms Segal correctly argued. However, the high-water mark of Ms Segal's submissions on this score is that the applicant's desire to move to Durban is not a consequence of her following her husband in his pursuit of the advancement of his career. If that is not the applicant's reason for her wanting to move to Durban, then it does not follow that she is mala fide.

[58] All told therefore, I am satisfied that there are rational, sound reasons for the applicant's intended move to Durban. I cannot therefore conclude that her intended relocation is mala fide.

[59] Leaving aside my assessment of the applicant's mala fides or otherwise, if the applicant were to be denied her application for leave to relocate, it would place her in most unenviable position, in that she will then give birth to her and her husband's child Johannesburg, while he is employed in Durban. She will have to do without the support of her family and her husband's daily attention and support. In one way the applicant is the author of her own misfortune. I think that Ms Segal's argument that the applicant must have known of her pregnancy some months ago and that she could have acted much sooner to address the predicament her pregnancy would necessarily imply, is sound. I am also persuaded by Ms Segal's argument that sympathy for the applicant is not where my attention should be focussed, not primarily at least.

[60] Yet, the fact that the applicant made a poor choice in how she responded to her pregnancy is one matter. The fact that she is pregnant is another. I have no doubt that if the applicant were to give birth in Johannesburg, while having to make do without the close support of the father of her child and her family, that it would cause her much distress and despair. The applicant in such a state is unlikely to be as good a mother to the minor as she would be if she could give birth to her child in Durban with the minor in her care. Naturally, the minor would be worse off with her mother in a state of distress and despair. If this were to happen, so

far as the applicant is concerned, it could be described as a self-inflicted wound, yet it would also bear on the minor. That ought to be avoided if it can be, for the minor's sake.

[61] Then there are the interests of the applicant's unborn child. It does not seem to me that I can or should ignore the interests of that child. I take it as self-evident that the applicant's unborn child will be better off if born in the close company of her father and her family than not.

[62] None of the experts or the family advocate have cause to doubt that it is in the minor's best interests that her primary care and residence should be with the applicant. However, the reports of the parenting coordinators pre-date the unlawful removal of the minor on 6 September 2024. The report of family advocate was written after the unlawful removal.

[63] So far, the facts indicate that the applicant should be permitted to relocate to Durban with the minor in her primary care, subject to the second respondent's rights of contact.

[64] Even the second respondent is in not in principle opposed to the applicant's exercising the responsibilities of the minor's primary caregiver (as set out above), but for one aspect. The second respondent's case, as I understand it, is that the applicant is a sound choice as the minor's primary caregiver, so long as he is closely involved in the minor's life. The minor's circumstances during the time when he was denied his rights of contact seem to bear this out, but as with most things involving minor children and less-than-perfect parents, it is not necessarily so simple.

[65] As stated above, the applicant, in clear breach of the legal obligations resting on her, took the minor to KwaZulu-Natal on 6 September 2024. The minor remained there until Marcandonatos AJ ordered her return in her judgment dated 26 September 2024. The applicant complied with this order, but then had to bring an urgent application of her own to return the minor to her care. (That order was granted on 24 October 2024, as set out above).

[66] The applicant's unlawful removal of the minor to Durban on 6 September 2024 is but part of the matter. In his answering affidavit, the second respondent relays what he was told by minor of her circumstances during the three weeks or so that she was in KwaZulu-Natal during this time. Normally, the hearsay evidence of a 10-year-old would not carry much weight, especially if contradicted by direct evidence. However, in the replying affidavit, the applicant, who can give direct evidence on the matter, deals with the second respondent's answering affidavit on these matters in a wholly unsatisfactory way. She does not engage with the facts at all. Instead, in part, she contends that the minor's living conditions at that time is irrelevant to the "review proceedings". That is true, but it is not irrelevant to the order the applicant seeks she be permitted to relocate with the minor to Durban and no doubt the applicant is alive to it. For the other part the applicant contends that the minor's circumstances at that time are irrelevant to what her circumstances will be if the relocation is allowed. That is also true, but it is not so simple. What the applicant does not gainsay is the second respondent's contention that, so long as he is in close proximity to the minor, then the applicant is a good mother, but on the one occasion that he was removed from the minor's life, she was not.

[67] Given that the applicant dealt with the second respondent's hearsay version of the living conditions of the minor between 6 and 26 September 2024, in the way that she did, I am satisfied that it is appropriate that I should accept the second respondent's version as established fact. Those facts are as follows.

[68] The minor was left in the care of her maternal grandmother at an address in Musgrave. The minor shared a bedroom with her grandmother (her grandfather moved to another room). The applicant did not reside there, but at the residence of her husband's parents, although the applicant visited her there "in the afternoon for short while". The minor experienced these conditions as "very awkward as her stepfather's parents are complete strangers to her". The answering affidavit does not reveal how far apart the two residences were, but even if only a short distance apart, it is a matter of serious concern to me. On an occasion the applicant placed the minor in the care of her maternal aunt. During this time, the minor attended school for only three days, and when she did, it was

her grandmother who dropped her off and collected her at end of the school day. The school that she did attend was a religious one – against the recommendation of the parental coordinators that the minor should attend a secular school.

[69] The applicant's husband took the minor's tablet computer and mobile phone, the former under the ruse that it was broken, but in either event it left the minor unable to communicate with the second respondent. Unsurprisingly, this left the minor "sad and caused her distress". Overall, the minor was "lonely, bored and isolated" – again not at all a surprise.

[70] Other aspects of the minor's living conditions are somewhat less dramatic. Such as that she was unaccustomed to the food given to her, she missed her pets, friends and the air-conditioning in her room in Johannesburg that she is used to.

[71] The minor's living conditions that the applicant exposed her to during this time is, undeniably unacceptable.

[72] The founding affidavit does not address the reasons for the applicant's removal of the minor from Johannesburg on 6 September 2024 in direct, express terms. However, it took place within in the context of the criminal charges that were first laid by the applicant against the second respondent and then at the instance of the second respondent, against the applicant and her husband.

[73] I am in no position to even speculate on the merits of the criminal charges that were laid by and against the applicant, but in all events, either the applicant, the second respondent and/or the applicant's husband have a propensity for committing arrestable offences, or one or more of them have a propensity of laying such charges without foundation. However that may be, these are not people who ought to have any more contact with each other than is strictly necessary. It is certainly not in the minor's interests that the cycle of arrests should continue.

[74] If the applicant had in mind to alienate the minor from the second respondent, then she must have realised that this would be a most counterproductive strategy. For one, she could not have expected the second respondent to lose interest in the minor. She must have anticipated that he would have reacted

exactly as he did, that is by launching the urgent application in which Marcandonatos AJ made the order referred to above. Moreover, she must also have realised that the conditions she foisted on the minor would have left her deeply unhappy and, if anything, would have made it far more difficult to make the minor accustomed to the idea of moving away from her familiar surroundings in Johannesburg. What is more is that the applicant herself could not have found it satisfying in any sense that she removed the minor from her own immediate care, by leaving her with her grandmother. None of this makes any sense, unless I accept that the applicant's decision was taken in haste and for that reason poorly thought out.

[75] In all the circumstances, it seems to me that the applicant reacted to the criminal charges laid against her and her husband by her move with the minor to KwaZulu-Natal on 6 September 2024. If she acted in haste, it would explain the peculiar living conditions of the minor during this time. If I take the applicant's and her husband's arrest as the event that caused her to remove the minor from Johannesburg, then it is fair to assume that the conditions under which the minor lived at that time is exceptional and is not a reflection of the applicant's general attitude towards her obligations to act in the best interests of the minor. For me to come to this conclusion is a matter of inferences to be drawn from the facts. These seems to me to be the most natural or plausible inferences to be drawn from the established facts. If I draw the inference that the minor's living conditions during September 2024 was an aberration, born of the applicant's hasty reaction to her and her husband's arrest, it seems to me that it should the grant the order sought by the applicant for leave for her to relocate to Durban with the minor. Dealing with the facts in this manner seems to me to be appropriate, given that in matter such as this, a formalistic approach to factual disputes is not appropriate, compared to ordinary adversarial matters. (*B v S* 1995 (3) SA 571 (SCA) at 584J – 585E)

[76] Inferences to be drawn from the facts on affidavit, especially in an urgent application is the lesser means of establishing the facts in a contentious matter, if compared to viva voce evidence. Viva voce evidence, subjected to cross-examination, coupled with discovery is certainly the superior means by which the

facts can be established. The shortcomings of motion proceedings as a means of placing evidence before a court, is apparent from the way in which factual disputes are resolved in applications in which final relief is sought. In such an application, factual disputes are generally resolved in favour of the respondent, not because the version of a respondent is more reliable, but because it gives the advantage to the party against whom an order is sought. The rules in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) 634H - 635C are not a mechanism for discovering the truth, it is a means to end – a less costly and quicker way of placing evidence before a court, where it is safe to base a judgement on the respondent's version.

[77] So far as the best interests of the minor is concerned, the enquiry is forward-looking. The question is not whether the applicant or the second respondent was the better parent in the past. The historic evidence is relevant for what it may tell one about the future. Therefore, if the resolution of the one or the other factual dispute will not be useful in a meaningful way to assess the best interests of the minor in the future, it is not worth cost of resolving that factual dispute by way of oral evidence.

[78] "Cost" in this context, first and foremost, means the detrimental effect that a referral to oral evidence with have on the minor. A referral to oral evidence, more than likely, will cause even greater conflict between the minor's parents. The history of this matter has shown that the applicant and the second respondent are poorly disposed to resolving their differences in a sensible manner. I cannot tell whether the blame for this lies with the one or the other of them, or both, but in all events, their penchant for causing and initiating litigation is undeniable. Especially the prospect of being cross-examined can be expected to be a source of stress for the applicant and the second respondent. The history of this matter has shown that conflict between the applicant and the second respondent tends to impact the minor. A referred to oral evidence in this sense is a cost that the minor will pay.

[79] In summary therefore, I am mindful of the undeniable fact that a referred to oral evidence would be the preferable way to get to the facts so far as the applicant's unlawful removal of the minor on 6 September 2024 and the facts surrounding

that event is concerned. However, the costs of establishing those facts (in the sense explained above), in my view is too dear to justify it. To be clear, the minor's living conditions during the period between 6 and 26 September 2024 is unacceptable. If those conditions were to be replicated, the applicant should emphatically be denied the relocation order she seeks. However, I am reasonably satisfied that those conditions were exceptional and are not likely to manifest again. I have little doubt that if it turns out that my assessment on this score is wrong and if the minor's conditions do resemble those as it were during the period between 6 and 26 September 2024 that the second respondent can be expected to bring the appropriate proceedings before a competent court.

[80] Moreover, as referred to above, undoubtedly less conflict between the applicant and the second respondent is better for the minor than more. Geographical distance between the applicant and the second respondent can be expected to reduce the likelihood of conflict between them. I cannot see how oral evidence will not lead to a different conclusion.

[81] In the result I make the following order:

(a) The matter is enrolled as an urgent application;

(b) It is declared that the order by the first respondent dated 10 January 2025 is a nullity;

(c) The applicant is granted leave to relocate from Johannesburg to Durban with the minor child […] during the first term break commencing on 8 April 2025;

(d) Following the relocation of the minor child, the second respondent shall be entitled to contact with her as follows:

i. Every second weekend from Friday after school to Sunday at 18h00 when the second respondent shall return the minor child to the applicant's care. To this end, the second respondent shall, at his cost, be entitled to exercise his weekend contact with the minor child in Durban or anywhere else in the Republic of South Africa and the applicant shall be liable and responsible to, one weekend every

month, transport the minor child to the second respondent in Johannesburg to facilitate their contact.

ii. Every Father's Day weekend, regardless of who was entitled to exercise contact with the minor child on that weekend;

iii. Every short school holiday;

iv. Half of every long school holiday. To this end, the applicant and the second respondent shall alternate the December/January holidays annually, such that the party who exercised contact during the first half of the holiday in one year, exercises contact in the second half of the following year;

v. Every alternative Eid;

vi. Subject to the minor child's educational, extramural and social activities, reasonable daily telephonic/electronic contact between 17h00 and 20h00;

vii. Any further contact as agreed between the applicant and the second respondent;

(e) There is no order as to costs.

H A VAN DER MERWE

ACTING JUDGE OF THE HIGH COURT

Heard on: 3 April 2025

Delivered on: 8 April 2025

For the applicant: Advv F Bezuidenhout and S Mabaso instructed by Joselowitz & Andrews Attorneys

For the second respondent: L Segal SC and Adv GT Kyriazis instructed by Farhan Cassim Attorneys