REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-MAT-2017/00179

In the matter between:

CS (Born S) **PLAINTIFF**

and

CS **DEFENDANT**

Neutral citation: *CS v CS (HC-MD-CIV-ACT-MAT-2017/00179)* [2021] NAHCMD 170 (12 April 2021)

Coram: PRINSLOO J,

Heard: **4 February 2019 – 7 February 2019; 10 February 2019 – 14 February 2019; 10 June 2019 – 14 June 2019; 17 June 2019 – 21 June 2019; 2 December 2019 – 8 December 2019; 18 May 2020 – 20 June 2020; 27 May 2020 – 29 May 2020 and 1 June 2020; 29 June 2020 – 03 July 2020; 10 August 2020 – 14 August 2020; 30**

September 2020 – 12 October 2020; 19 October 2020;19 January 2021

Delivered: 12 April 2021

Flynote: Custody and control of the minor child – application for leave to relocate with the minor child – legal principles to be applied – best interest of the child – Child Care and Protection Act 3 of 2015.

Expert witness – role and duties – impartiality of expert witnesses.

Summary: This case relates to the custody and control of the minor child born from the marriage between plaintiff and the defendant. The parties became divorced during 2017, during which proceedings the parties reached settlement on the issue of custody and control of the minor child.

The plaintiff, who is the mother of the minor child, has been the primary care giver since birth and became the minor child's custodian parent at the time of divorce.

The plaintiff remarried in 2018 and decided to relocate from Swakopmund, Namibia to Stellenbosch, South Africa to be with her new spouse. She applied for leave to relocate with the minor child, which application was opposed by the defendant, who is the father of the minor child.

In his opposition the defendant filed an affidavit accusing the plaintiff of being a binge drinker and functional alcoholic and therefore unable to care for the minor child. These allegations were denied by the plaintiff.

The court considered the two schools of thought applicable to relocation cases, namely the pro-relocation approach and the neutral approach.

The pro-relocation approach has a presumption in favour of allowing the primary caregiver to relocate. In terms of the neutral approach there is neither a presumption in favour of or against relocation and a court applies a fresh inquiry into each case as it arises.

The parties engaged the services of three experts in the social sciences to determine whether it was in the best interest of the child to remain in Namibia or relocate with the plaintiff to South Africa.

Held that generally, following a divorce, if a custodian parent wishes to emigrate, a court will not lightly refuse leave for the children to be taken out of the country, if the custodian parent's decision is bona fide and reasonable.

Held that there is no onus in the conventional sense on the party applying for an order to prove that relocation is the best interest of the child

Held that no presumption should operate in favour of either party and that the case should be decided in context of the Constitution and the Child Care and Protection Act 3 of 2015 which deals with the best interest of the child. Each case must be decided on its own particular facts as no two cases are the same and past decisions based on other facts may be useful by providing guidelines but no more than that.

Held that refusing a custodian parent to relocate with the minor child will impact on the custodian parent's emotional and psychological well-being which will in turn impact on the well-being of the child. This need not be projected on the minor child because as a matter logic a bitter and unhappy parent cannot provide a child with a happy and secure environment.

Held that impartiality of expert witnesses means that such experts operate within scientific principles and legal procedures. By doing so, they assist the trier of fact.

The court satisfied itself that the plaintiff's reason for wanting to relocate is reasonable and bona fide and that there appears to be no truth in either the allegation of alcoholism or the allegation of reckless and irresponsible behaviour in respect of C.

The plaintiff is granted leave to relocate with the minor child subject to the defendant's rights of reasonable access.

ORDER

Judgment is granted in favour of the plaintiff in the following terms:

1. The defendant's counterclaim is dismissed.

2. That custody and control of the minor child born from the marriage is awarded to the Plaintiff subject to the Defendant's reasonable rights to access, which portion is attached hereto and marked **Annexure A**.

3. That the plaintiff is granted leave to re-locate to Stellenbosch, Republic of South Africa, with the minor child so born from the marriage subject to the defendant's rights of reasonable access, which portion is attached hereto and marked **Annexure A**.

4. The defendant is ordered to sign all the necessary papers for a passport to be obtained on behalf of the minor child and the necessary consent to leave the Republic of Namibia in the care of the plaintiff.

5. The defendant to pay maintenance for the minor child, in the amount of N$5 000-00 (Five Thousand Namibia Dollars) per month, free of bank charges and without deductions payable on/or before the 7th of each consecutive month. The maintenance will be subject to an annual escalation of 10% on the 1st of May of each consecutive year. The first payment is to commence on 1 May 2021.

6. That costs is awarded to the plaintiff, such costs to include the costs consequent upon the employment of one instructing and one instructed counsel.

7. Each party to pay the disbursements, expenses, qualifying fees and attendance fees of their respective expert witnesses.

JUDGMENT

PRINSLOO J

Introduction

[1] The matter before me relates to the custody and control of the minor child born from the marriage between plaintiff (the mother of the minor child) and the defendant (the father of the minor child). The parties became divorced during 2017, during which proceedings the parties reached settlement on the issue of custody and control of the minor child.

[2] However, the issue of custody rose again due to the plaintiff's intended relocation from Namibia to South Africa. In addition to her prayer for custody and control, the plaintiff now also requested leave to relocate to South Africa with the minor child, thereby adding fuel to an already acrimonious dispute between the parties.

[3] The issue of relocation is central to the custody dispute between the parties and as such this matter may be classified as a 'relocation case'.

[4] Rt. Hon. Lord Justice Thorpe described the problem of relocation as follows in his article 'Relocation –The Continued Search for Common Principles[1]:

'The frequency and intensity of parental disputes over relocation are a relatively modern phenomenon. They are a by-product of communication and travel technology exemplified by the wide-bodied jet and the World Wide Web. National frontiers are lowering as we create a global world. . .

. . .Add to all that the separation factor. In many of our jurisdictions relationships are easily formed and children follow. But the relationships are as easily unformed and the family fractured. In such a painful process one of the parents may well at some level need to distance himself or herself physically as well as emotionally from the other. Dissension results and the contested relocation case is born. Judges in several jurisdictions have said that these are some of the most difficult cases that a judge has to decide.'

[5] Chief Justice Bryant[2], Chief Justice of the Family Court, Australia (as she was then), described the complexity in relocation cases as follows:

'Relocation cases are the hardest cases that the court does, unquestionably. If you read the judgments, in almost every judgment at first instance and by the full court you will see the comment that these cases are heart-wrenching, they are difficult and they do not allow for an easy answer. Internationally, they pose exactly the same problems as they pose in Australia. I have heard them described as cases which pose a dilemma rather than a problem: a problem can be solved: a dilemma is insoluble[3].'

[6] Truer words have never been spoken. In comparison to our neighbouring and international jurisdictions, our courts have rarely been called upon to pronounce themselves on relocation cases. This court therefore finds itself in unprecedented waters, having to call on the wisdom of King Solomon in biblical times to rule upon this matter.

---

[1] Journal of Family Law and Practice, Volume 1, Number 2, Autumn 2010.

[2] Chief Justice Diana Bryant was appointed Chief Justice of the Family Court of Australia on 5 July 2004 and retired on 12 October 2017.

[3] Proof transcript of evidence, 26 July 2005. p.8. House of Representatives Standing Committee on Legal and Constitutional Affairs, Report on the exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (August 2005) at 22–24.

Background

[7] The parties before me were married to each other on 19 March 2011 in Swakopmund, out of community of property. From the marriage, one minor child, C, was born on 1 September 2014.

[8] The plaintiff instituted divorce proceedings on 23 January 2017 against the defendant. Initially, the defendant opposed the divorce action, however the parties reached settlement on 31 March 2017 and the defendant subsequently withdrew his defence on 4 April 2017.

[9] The settlement agreement dealt with the custody and access to and maintenance in respect of the minor child, C, as well as the parties' respective proprietary rights and costs.

[10] As a result of the settlement reached between the parties the divorce proceedings then continued on an unopposed basis and a restitution of conjugal rights order was granted in favour of the plaintiff on 19 April 2017 with a rule *nisi* return date of 29 June 2017.

[11] On 29 June 2017, however, the defendant filed an affidavit to show cause wherein he opposed the relief sought in respect of the minor child, specifically on the issue of custody and access.

[12] In the affidavit, the defendant stated that he entered into the settlement agreement on the advice of a legal practitioner in Swakopmund, whose mandate he had since terminated. Subsequent to the parties separating, certain incidents occurred which raised his concerns regarding C's well-being. As a result, the defendant opposed the relief sought by the plaintiff in respect of the custody and control of the minor child and filed the affidavit to show cause accordingly. He, however, did not oppose the granting of the final order of divorce.

[13] On the return date of the *rule nisi*, ie 29 June 2017, the parties' erstwhile legal practitioner appeared before this court and prayed that the court proceed to grant the final order of divorce sought, incorporating the settlement agreement between the parties, save for the paragraphs dealing with the parties' custody, control and access to the minor child. The parties requested that these issues be adjudicated separately.

[14] This court entertained the parties request and consequently granted a final order of divorce on 29 June 2017 in the following terms:

'Having heard Mrs YSSEL, on behalf of the Plaintiff(s) and Mr SMALL, on behalf of the Defendant(s) and having read the Application for HC-MD-CIV-ACT-MAT-2017/00179 and other documents filed of record:

IT IS ORDERED THAT:

1. That the bonds of marriage subsisting between the Plaintiff and the Defendant be and are hereby dissolved.

2. That the deed of settlement concluded between the parties, filed of record and marked "B" is hereby made an Order of Court (excluding paragraph 2 of the settlement agreement under heading CUSTODY AND ACCESS OF THE MINOR CHILD).

3. The case is postponed to 17/08/2017 at 15:00 for Status hearing (Reason: To address the ancillary issue regarding the custody of the minor child).'

[15] The parties thereafter proceeded to engage one another during an alternative dispute resolution process, but were unable to settle the issues of custody, control and access to the minor child.

[16] The parties however agreed that para 2.1 of the settlement agreement, which relates to custody, control and access to the minor child would regulate same until such time that the matter would become finalised. On 17 August 2017 their consensus on this aspect was recorded as an order of this court as follows:

'Paragraph 2.1 of the settlement agreement so reached between the parties (previously marked as annexure "A") is made an order of the court for the time being, with

immediate effect, pending the finalization of the issue of custody and control of and access to the minor child.'

[17] Paragraph 2.1 of the Settlement reads as follows:

'2.1 The parties agree that it is in the best interest of the minor child, C.S.S (born on 1 September 2014), that full custody and control be awarded to the Plaintiff subject to Defendant's rights of reasonable access being reserved as follows:

2.1.1. daily telephonic access subject to the minor child's activities;

2.1.2. two days per week as agreed between the parties between the hours of 14h00 to 18h00;

2.1.3. every alternative weekend from 17h00 on Friday until 17h00 on Sunday;

2.1.4. every alternative short holiday with the effect that such access will fall over the Easter period every alternative year;

2.1.5. half of every long holiday with the effect that such access will fall over the Christmas holiday every alternative year.

2.1.6. such further access as agreed upon between the parties.'

[18] The above position has prevailed since 2017 to date.

[19] Before I proceed to discuss the matter any further it is important to keep in mind that this matter has a long history and whereas the minor child concerned was only three years old at the time when the plaintiff instituted the action, she is currently six and a half years old and was enrolled in the first grade at the beginning of this year.

<u>The affidavit to show cause</u>

[20] As stated earlier, the defendant filed an affidavit to show cause on the *rule nisi* return date. It is this affidavit which set the stage for a very long and extended trial. Due to its importance, it is necessary to extract portions of the said affidavit that are essential for purposes of this judgment.

[21] The defendant expressed his concerns regarding the well-being of the minor child in his affidavit to show cause, which concerns were recorded as follows[4]:

'19. My concern has to do with the well-being of C and the plaintiff's worsening habit of freely consuming alcohol.

20. Although the plaintiff always enjoyed drinking and socialising, her recent behaviour (since our separation) has deteriorated to the extent that I would characterize it as being highly irresponsible and prejudicial to the upbringing and wellbeing of our daughter.

21. Plaintiff is, in my opinion, a binge drinker and functional alcoholic. She would typically start drinking on a Thursday afternoon, picking up speed, so to speak, towards the weekend.

22. Plaintiff now regularly goes out and consumes alcohol in copious amounts. I have been informed by mutual acquaintances that plaintiff is regularly seen out on town visiting social establishments while clearly under the influence of alcohol. I believe that the plaintiff has a serious drinking problem.

23. My concerns are aggravated by the fact that Plaintiff regularly leaves our daughter C, in the care of her mother, who also resides in Swakopmund with Plaintiff until the wee hours of the morning before returning home. Plaintiff also drives around with C while she is under the influence of alcohol. The problem is that plaintiff's mother, who resides with plaintiff, also consumes large amounts of alcohol.

24. Plaintiff further regularly travels to South Africa for extended periods of up to 10 days at a time, merely leaving C with her grandmother.

25. C who is not yet 3 years old, has no established routine when in Plaintiff's care and I do not regard the conditions at Plaintiff's house as conducive to C's upbringing.

26. I am further not comfortable with the arrangement that C is merely left in the constant care of Plaintiff's mother.

27. Plaintiff, her mother and her two sisters, JS and NS all consume alcohol excessively and regularly.

28. . . .Mr. N R has first-hand knowledge of the habit of alcohol abuse of Plaintiff and her family. . . .

29. . . .Plaintiff seems to have very little time to spend with C these days. Plaintiff, for instance, missed C's first day at kindergarten

[4] Para 19-32 of the Affidavit to Show Cause.

30. . . .

31. I honestly believe that the conduct of Plaintiff in caring for C is reckless and irresponsible. As I have stated above, I am of the opinion that C is being neglected.

32. My concerns for C's wellbeing and the recent change in circumstances have forced me to seek the advice of another lawyer and alternatively approach this Court with this affidavit to show cause.'

[22] I will return later in this judgment to the averments contained in the defendant's affidavit to show cause.

The pleadings

Plaintiff's amended particulars of claim

[23] Subsequent to the filing of the defendant's notice to show cause, the plaintiff amended her particulars of claim to plead that it is in the best interest of the minor child that full custody and control be awarded to her subject to the defendant's reasonable rights of access terms of the settlement agreement.

[24] The plaintiff further pleaded that she has the bona fide intention to relocate, along with the minor child, to Stellenbosch, Republic of South Africa but that said relocation was opposed by the defendant on the grounds as set out in paragraphs 17 to 34 of his affidavit to show cause. She pleaded that the adverse allegations made in the affidavit to show cause are denied. More specifically, the plaintiff denied that she has a drinking problem, is highly irresponsible or that she is a binge drinker and a functional alcoholic as alleged by the defendant. Furthermore, she denied possessing the type of behaviour complained of in the affidavit, which behaviour is said to have had a prejudicial and negative effect of the upbringing and wellbeing of the minor child.

[25] The plaintiff also denied that her mother, who would at times take care of the minor child, consumed excessive quantities of alcohol as alleged or at all.

[26] The plaintiff admitted that at certain periods she had travelled to South Africa and when doing so, had acted bona fide in that she had left C in the care of her

mother, in whose care she was well taken care of and looked after. The plaintiff however, denied that C was left in the constant care of the plaintiff's mother, as alleged by the defendant.

[27] To buttress the bona fides of her intended relocation with C and that such relocation would not only be in C's best interest but would also not be prejudicial to the reasonable rights of access of the defendant, the plaintiff pleaded the following:

a) She is a competent custodian and best suited to be the primary caregiver and caretaker of the minor child.

b) The defendant is a South African citizen having permanent residence status in Namibia and it would not be a major obstacle for the defendant to visit the minor child in Stellenbosch.

c) The defendant has the financial means to regularly visit the minor child in Stellenbosch.

d) In addition, there could be no question of severe dislocation of the minor child (who was 3 years old at the time) as she would easily be able to adapt to a new environment.

e) The defendant would continue to enjoy reasonable access to the minor child as is set out in the "Deed of Settlement" and that the plaintiff, along with the minor child, would frequently visit Namibia and Swakopmund where her mother lives.

f) In addition to the above-mentioned rights of access so agreed upon between the parties on or about 31 March 2017, the defendant would also have the rights of reasonable access when and at the times he visits the minor child in Stellenbosch, Republic of South Africa.

[28] The plaintiff pleaded that it was clear from the fact that the defendant had agreed to a settlement that he had confirmed the plaintiff to be a competent mother and that it was in the minor child's best interest that she be awarded with custody and control. She further pleaded that the defendant's allegation that custody and control of the minor child be awarded jointly to the parties is mala fide, unfounded

and an attempt to frustrate the bona fide desires and opinions of the plaintiff as the custodian parent, to relocate to Stellenbosch.

[29] Lastly, the plaintiff pleaded that her opinion and desires as the custodian parent should not be ignored and/or pushed aside and that the negative consequences associated with compelling her to stay in Swakopmund outweighed the negative consequences of her relocation to Stellenbosch.

[30] The plaintiff, therefore, prayed for the following relief:

'1. That custody and control of the minor child born from the marriage be awarded to the Plaintiff subject to the Defendant's reasonable rights to access as per prayer 2 hereinbelow.

2. That the Plaintiff be granted leave to re-locate to Stellenbosch, Republic of South Africa, with the minor child so born from the marriage subject to the Defendants rights of reasonable access as follows:

2.1. As and when both Plaintiff and Defendant resides in the same location;

2.1.1. daily telephonic access subject to the minor child's activities;

2.1.2. two days per week as agreed between the parties between the hours of 14h00 to 18h00;

2.1.3. every alternative weekend from 17h00 on Friday until 17h00 on Sunday;

2.1.4. every alternative short holiday with the effect that such access will fall over the Easter period every alternative year;

2.1.5. half of every long holiday with the effect that such access will fall over the Christmas holiday every alternative year.

2.1.6. such further access as agreed upon between the parties.

2.2. As and when the Defendant visits Stellenbosch then;

2.2.1. Until the minor child has reached the age of 5 (five) years), have the minor child with him 2 (two) times per week between the hours 14h00 and 19h00 on any such given 2 (two) days suitable to him and as per prior arrangement with the Plaintiff.

2.2.2. From when the minor child has reached the age of 5 (five) years, 2 times a week from 17h00 for a sleepover with the *proviso* that the Defendant then takes the minor child to the "pre-primary school" or school the next morning in the event of the minor child attending "primary school" or school at the time or, to deliver the minor child at the home of the Plaintiff at 08h00 on the morning following the sleepover in the event of the minor child not yet attending pre-primary school or school.

2.2.3. Should and in the event of the Defendant being in Stellenbosch over a period which will include 2 (two) consecutive weekends then the Defendant will have the right to have such minor child over both such weekends from the Friday at 17h00 until the Sunday at 18h00.

2.2.4. In the event of the Defendant being in Stellenbosch for a period exceeding 2 (two) consecutive weekends then the rights of access of the Defendant towards such minor child will resort back to annexure "C" hereto i.e. every alternative weekend from 17h00 on the Friday to 17h00 on Sunday.

2.2.5. Every alternative short holiday with the effect that such access will fall over the Easter period every alternative year.

2.2.6. Half of every long holiday with the effect that such access will fall over the Christmas period every alternative year.

3. An order directing the Defendant to pay maintenance for the minor child until she has become self-supporting, in the amount of N$5 000-00 (Five Thousand Namibia Dollars) per month, free of bank charges and without deductions payable on/or before the 7th of each month, which amount will be subject to an annual escalation of 10% on the anniversary date of the final order of divorce.

4. An order directing the Defendant to pay 50% (fifty percent) of the crèche fees, pre-school fees, school fees, after school care fees, school contributions, school insurances, school outings, school tours, transport costs, extra-mural activities, school books, school uniforms and education facilities (schools and institutions for higher education is applicable) in respect of the minor child until she is self-supporting.

5. Cost of suit.'

Defendant's counterclaim

[31] In his counterclaim the defendant pleaded that it would serve the best interest of the minor child if custody and control were shared equally between the parties and

that access was to be regulated in such a way to ensure that C spends an equal amount of time with each parent. In the alternative, if the court was to reject the defendant's prayer for joint custody, and in the event that the plaintiff relocates, the defendant pleaded that it would serve the child's best interest that custody and control be awarded to him, subject to the plaintiff's right to reasonable access.

[32] The defendant pleaded that in contrast to the plaintiff, he is a competent custodian and best suited to be the primary caregiver and caretaker of the minor child. He pleaded that the plaintiff is a Namibian citizen which would enable her free and frequent access to the minor child. He further pleaded that the plaintiff has the financial means to frequently visit the minor child in Namibia on which visits she would have liberal access to the minor child.

[33] The defendant pleaded that as the minor child had been subjected to several periods of extended absence of the plaintiff, she would be able to sufficiently adjust to the plaintiff’s absence should the plaintiff relocate to the South Africa. If the periods between the plaintiff's visits would be limited to more or less the same periods of time when the plaintiff had previously been absent, the minor child would not be subjected to any upheaval. The child would thus not be disrupted from her current daily routine and the secure environment she was accustomed to, and would thus be able to keep the personal relationships with individuals she was at stage in daily contact with intact.

[34] The defendant pleaded that over and above the access that the plaintiff would have while visiting the minor child in Namibia, she would also be allowed to take the child with her to Stellenbosch for half of each school holiday, which holidays would rotate in order for the child to spend alternate Easter and Christmas periods with her respective parents.

[35] The defendant claimed the following relief:

‘An order for joint physical custody and control of the minor child to be awarded to the parties.

a) In the alternative, the defendant be awarded custody and control of the minor child, subject to the plaintiff's right to reasonable access.

b) In the event that joint custody and control is awarded and in the event that the defendant is awarded sole custody and control over the minor child (and should the plaintiff elect to stay in Swakopmund) access to be rotated in order to ensure that it is exercised on a 50/50 basis.

c) In the event that the plaintiff elects to relocate, the plaintiff to have access to the minor child whenever she visits Namibia, which access to be regulated to ensure that it adheres to the 50/50 principle.

d) The plaintiff to have access to the minor child and to be allowed to exercise this access in South Africa, half of every Namibia School holiday, said holidays to rotate in order to ensure that each party shall have access to the minor child Easter-and Christmas periods every alternative year.

e) The parties to rotate the access periods to cater for Mother's- and Father's Day, birthdays and special occasions.

f) The plaintiff to have daily telephone/ video calls.

g) The plaintiff to be equally liable for the schooling related expenses of the minor child (details omitted), and

h) Cost of suit. '

Plea to the counterclaim

[36] In her plea to the counterclaim, the plaintiff pleaded that it is in the best interest of the minor child that custody and control be awarded to her for several reasons, namely that:

a) As a competent and capable mother, she is best suited to care for the needs of their minor daughter.

b) Being the mother and being of the same sex as the minor child, she is best suited to be the child's primary caregiver and caretaker.

c) The claim for joint custody by the defendant is a mala fide attempt to unreasonably frustrate the plaintiff's bona fide efforts to relocate to Stellenbosch.

d) The parties are incompatible which is not conducive to a situation of joint custody and control, and would only be to the detriment of the interest of the minor child.

e) The plaintiff admitted that she is a Namibian citizen but pleaded that the overriding criteria remains and continues to revolve around the question as to what is and will be in the interest of the minor child. She further pleaded that the defendant is equally a South African citizen who will then have free, frequent and unhindered access to the minor child should she relocate to Stellenbosch, Republic of South Africa, and the defendant will be in a position to enforce any right that he might have or acquire in Namibia, in the Republic of South Africa by virtue of the provisions of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1995.

f) On the issue of her financial means, the plaintiff pleaded that she has sufficient financial resources to use for what is in the best interest of the minor child.

g) The counterclaim of the defendant is not bona fide to the extent that the "Notice to Show Cause" of the defendant, is not purely and solely aimed at what is considered to be in the best interest of the minor child but a selfish and ulterior attempt to penalize the plaintiff for the divorce and the consequences thereof. The plaintiff pleaded that had she not expressed her desire to relocate to Stellenbosch, this Court would not have been faced with an application for joint custody and control alternatively, sole custody and control by the defendant.

The factual matrix

[37] I do not intend to repeat the extensive evidence of the plaintiff and the defendant for purposes of my judgment, but will instead attempt to summarise the relevant phases of the parties' relationship as a backdrop to these proceedings, from its inception to its deterioration, and where the parties find themselves today.

[38] Although the divorce had been finalised, there were several issues raised between the parties as to their conduct during the marriage that might ultimately

have an impact on the decision of this court regarding the best interest of the minor child.

[39] The discussion hereunder relates to the common cause facts between the parties.

The relationship before the birth of the minor child

[40] The parties met in January 2010 and soon began a romantic relationship. Not long thereafter the parties took up residence together and were married on 19 March 2011. At the time, the plaintiff was self-employed as a personal trainer and owned her own business. The defendant at the time was employed as a jewellery designer and goldsmith. Shortly after the couple were married the defendant resigned from his permanent position and started his own business under the auspices or umbrella of the plaintiff's business.

[41] All went well with the parties until around mid-2012 when the defendant struck up a 'friendship' with a close friend of the plaintiff. Although the defendant was keen to advance this friendship into something less platonic, it did not result in a physical relationship. The plaintiff's friend informed her of the advances made by the defendant and that was the end of the potential relationship as well as her friendship with the plaintiff.

[42] During November 2012 the defendant entered into an adulterous relationship with one CS, who at the time managed a Bikers Office Club[5] that was situated next to the defendant's workshop. The defendant was also coincidentally a member of the said biker's club and had already known CS for a considerable period of time as they had met in 2007. CS also happened to be married to a very good friend of the defendant, who too was member of the bikers club.

[5] The full name of the Biker's Club is withheld.

[43] The relationship between the defendant and CS was physical and their interludes took place at the defendant's workshop. The defendant described their relationship as one of "friends with benefits".

[44] This relationship continued for a period well in the excess of a year. According to FS (CS's husband), he became aware of the relationship in 2014 and it would appear that at the time the relationship was ongoing. However, according to the defendant, the physical aspect of their relationship ended during December 2013. They however continued to exchange sexually explicit and graphic WhatsApp messages up to November 2014. These WhatsApp messages were discovered by FS when he accessed his wife's phone after becoming suspicious of the defendant and CS.

[45] FS confronted his wife and the defendant with the adulterous relationship during November 2014 and both admitted thereto. The defendant was put on terms to inform his wife of the relationship. He promised to inform the plaintiff but stated he needed time to do so as they had a small baby. The defendant however did not inform the plaintiff of his relationship with CS.

[46] During the time of this ill-fated relationship with CS the plaintiff desperately wanted to become pregnant and suffered several miscarriages. She eventually fell pregnant with little C and was able to carry her to term. Baby C was born on 1 September 2014.

[47] Both parents were smitten with their little girl and although the plaintiff exclusively breastfed C, the defendant assisted as far as he could by changing her and looking after her whilst the plaintiff was involved in training or athletics meetings.

[48] When the plaintiff returned to work, she cared for C at her office at the gym. Alternatively, when the plaintiff was busy, her mother, who was employed by the plaintiff, would care for baby C.

Relocation to Stellenbosch

[49] During 2015 the parties discussed their possible relocation to Stellenbosch in the Western Cape, South Africa. The move was prompted by financial considerations as the defendant's income became more and more erratic and the financial difficulties caused a strain on the couple's marriage. According to the defendant, the plaintiff wanted to relocate to Stellenbosch for some time and even applied for South African citizenship.

[50] On 2 September 2015 the couple made the move to Stellenbosch. At the time C was approximately one year old. The plaintiff took up employment with Mr PH, a property developer and friend, who had a holiday home in Swakopmund next to that of the couple.

[51] In addition to her employment with PH, the plaintiff also worked as a personal trainer at a Virgin Active gym in Stellenbosch.

[52] The defendant managed to secure a subcontract in Paarl at a pallet factory and had to work very long hours. He also did part-time work as a jewellery designer for jewellers in the Stellenbosch area.

[53] During this time, the defendant's mother came to stay with the couple to assist with caring for little C.

[54] In December 2015 the defendant's subcontract was terminated and the couple decided to relocate back to Namibia in February 2016. By this time definite cracks were showing in the marriage between the plaintiff and the defendant.

Back in Swakopmund

[55] Upon their return to Swakopmund the plaintiff continued with her businesses and the defendant set up a workshop at their home as an independent goldsmith. The plaintiff's mother moved in with the parties to look after C whilst the plaintiff and the defendant were at work.

[56] The relationship between the parties deteriorated to the point where the plaintiff requested the defendant to move out of the marital bedroom during September 2016. In October 2016, a friend of the plaintiff informed her about the defendant's previous affair with CS. The plaintiff contacted FS, CS's husband, to confirm the truth of the allegation.

[57] The parties met over coffee during October 2016 and the plaintiff informed the defendant that she wanted a divorce and sole custody of their daughter. The defendant was not agreeable to the plaintiff having sole custody and informed her that he would obtain the services of his own legal representative.

[58] The parties agreed that the defendant would move out of the common home by the end of November 2016. Things, however, went pear shaped when the plaintiff confronted the defendant about a romantic relationship with one MW. Their disagreement surrounding the alleged affair did not go very far, but resulted in the defendant moving out of the common home before the end of November 2016.

[59] Then on 15 November 2016, the plaintiff confronted the defendant about his previous relationship with CS. This ended up in substantial altercation between the parties resulting in the defendant banging glass doors of the house to get to C. As a result the plaintiff restricted the defendant's access to C out of anger. This restriction lasted for two days, and when the plaintiff cooled down the position regarding the defendant's access to C returned to normal.

[60] In the months that followed after the separation, the plaintiff met up again with her previous employer and longstanding friend, PH. Their relationship became

romantic and the plaintiff would often commute between Swakopmund and Stellenbosch in order to visit PH.

[61] On 17 April 2017, some 14 days after having concluded the settlement agreement, the plaintiff informed the defendant that she intended to relocate to South Africa together with the minor child. The intended move was as a result of her romantic relationship with Mr PH having become more serious. The plaintiff also proposed that the defendant should also consider relocating to Stellenbosch, which the defendant indicated he would consider.

[62] Subsequently, the parties entered into a formal settlement agreement signed on 31 March 2017 and 3 April 2017 respectively. As stated earlier in this judgment[6], the settlement agreement was made an order of court during the course of the divorce proceedings, excluding the paragraphs of the settlement agreement which related to custody and access of the minor child and a final divorce order was granted by this court on 29 June 2017.

Developments since the inception of the enquiry

[63] The plaintiff married PH in September 2018 and continued to commute between Stellenbosch and Swakopmund (except for the national and regional lockdown period when the plaintiff and her husband had to remain in Swakopmund). At times the plaintiff would travel with C, and at others she would leave C with the defendant.

[64] During the times when the the plaintiff would travel and leave C in the defendant's care, he would rely on either C's maternal grandmother or his own mother to care for C at times when he would be unable to do so.

[6] See at para [14] above.

[65] The marriage between the plaintiff and PH appears to be stable and C settled into her relationship with her stepfather and her two step-siblings. C's stepbothers are 19 and 23 years old respectively and are busy with their tertiary studies at the Universities of Stellenbosh and Pretoria respectively.

[66] Due to the COVID-19 pandemic the defendant lost his sub-contract contract and became self-employed, being commissioned to create artwork for clients in Europe and elsewhere. The defendant derives an income that is sufficient to sustain his needs and comply with all his commitments.

[67] The defendant's elderly mother relocated to Swakopmund and is currently living with the defendant. The defendant's father and one of the defendant's cousins are also in the process of relocating to Swakopmund.

[68] As a result of the plaintiff's marriage to PH the issue of relocation was further discussed with the defendant in order to reach some amicable resolution to the problem. At some point during these discussions the plaintiff's husband, PH, addressed a letter to the defendant offering to pay for the plaintiff and C to visit Swakopmund 10 days out of every month, at his (PH's) cost, if the parties agreed to have the plaintiff permanently relocate with C to Stellenbosch. This arrangement would have been applicable for the period up to 2020 when C would enter pre-school. The defendant refused the offer.

Main issues raised regarding the parenting of the parties

[69] Two major issues were raised between the parties against each other which were argued to impact their respective parenting of C. These issues are a) the defendant's sexual exploits and b) the plaintiff's alleged alcohol abuse, which essentially impacted her ability to care for C and thus negatively impacted C's wellbeing.

[70] The experts who testified during the trial pertinently investigated these allegations, addressed them with the collateral sources of information and incorporated them in their respective reports.

[71] As already stated, the plaintiff vehemently denied the allegations of her alleged alcoholism or the fact that she is a functional alcohol as alleged by the defendant in the affidavit to show cause.

Reasons advanced by the parties to be awarded custody

The plaintiff

[72] It is the plaintiff's case that after C's birth she breastfed her exclusively and would take her to work, where she would care for C. At times when she was otherwise engaged with work she relied on her mother to look after C. The defendant, therefore, played a limited role in caring for C.

[73] Once they moved to Stellenbosch, the defendant worked very long hours and would leave home early in the morning, only to return late at night. C would go to the crèche during the mornings and in the afternoon the defendant's mother would look after her until the plaintiff came home.

[74] After the parties moved back to Swakopmund the plaintiff's mother moved in with them and would look after C whilst the plaintiff and defendant were at work. According to the plaintiff the defendant would work in his workshop at home and did not play a role in C's upbringing. She stated that she had been quite flexible in respect of her work set-up and was therefore mostly available to care for C. When she was not available to do so, the plaintiff's mother would look after C.

[75] At the time of the plaintiff's evidence the defendant was still in full-time employment and the plaintiff maintained that the defendant did not have the flexibility

to look after C and now as the defendant is self-employed the position remains the same as the defendant is working long hours.

[76] The plaintiff testified that if the court grants her leave to relocate to Stellenbosch she would not be required to work and would therefore be in position to give all her time and attention to C. This would not be the case if she would have to remain in Swakopmund.

[77] Furthermore, should the court grant her leave to relocate with C, the status quo in respect of her being the primary caregiver of C would simply continue.

[78] The plaintiff testified that she has always endeavoured to promote and encourage the relationship between father and daughter, so much so that she even proposed that the defendant also relocate to Stellenbosch.

[79] The plaintiff testified that in her opinion the parties would not be before this court if she had intended to move somewhere within the borders of Namibia. She however contended that the move to Stellenbosch would not be much different to a move within Namibia. The relocation was not intended to be internationally but cross-border to Stellenbosch, where the defendant as a South African citizen, resided for 10 years prior to their marriage.

[80] To further bolster her point that she endeavoured to promote the defendant's relationship with their daughter the plaintiff testified that during the periods that she commuted between Swakopmund and Stellenbosch she left C with the defendant alternatively if C travelled with her the defendant got equal time with her upon their return back to Swakopmund. This arrangement was no part of the interim settlement agreement between the parties.

[81] The plaintiff testified that she would continue to foster the relationship between the defendant and their daughter by any means necessary should the court allow her to relocate. She testified that her husband went as far as offering to pay for the plaintiff and C to travel 10 days per month to Swakopmund at his costs, to allow

the defendant to see the minor child. The defendant summarily dismissed the offer in a derogatory manner.

[82] According to the plaintiff, the defendant is laid back and incapable of looking after himself. She further submitted that the defendant is erratic, uncertain and unstable in his employment, and that he is emotionally draining on C.

[83] The plaintiff testified that the defendant is dishonest and deceitful. This was based on the defendant's extra-marital affairs and his attempts to engage in a romantic relationship with the plaintiff's best friend. There were other incidents that the plaintiff referred to as well that are not relevant for these proceedings.

[84] On her alleged alcohol abuse, the plaintiff conceded that she likes to enjoy a glass of wine or even a few glasses of wine on occasion but denies that she drinks excessively or to the extent that she is incapacitated.

[85] The plaintiff denies the contents of the affidavit to show cause, and more specifically the allegations made in paragraphs 17 to 30[7] of the said affidavit and reiterated during her evidence that the allegations that she is a binge drinker, a functional alcoholic and is irresponsible in respect of her care of the minor child are devoid of any truth.

[86] She further reiterated that her intention to relocate to Stellenbosch is bona fide and it would be in the best interest of the minor child.

The defendant

[87] The defendant testified that the reason he signed the settlement agreement agreeing to terms of custody, was because he had been misinformed by his erstwhile legal practitioner in Swakopmund. Furthermore, at the time of his signing the settlement agreement he was unaware of the plaintiff's intention to relocate to Stellenbosch. He regarded her failure to inform him of her intention to relocate as a misrepresentation.

[7] See para [21] above.

[88] The defendant testified that the plaintiff frequently went on drinking binges and as such he worried about who would look after C in those circumstances. He had previously been unconcerned with her excessive drinking as he had been there to care for C when the plaintiff socialised and was too intoxicated to care for their daughter. Her binge drinking and abuse of alcohol therefore had no effect on the minor child. He testified that under those circumstances, he was not willing to consent to the minor child's permanent relocation to Stellenbosch.

[89] The defendant stated that he raised the issue of binge drinking on two prior occasions with the plaintiff and he voiced his concerns in this regard.

[90] On the issue of custody, the defendant testified that subsequent to the divorce when the plaintiff travelled to Stellenbosch she would leave the minor child with him but this only happened after the defendant came to the knowledge that the plaintiff had left for South Africa without telling him, and C had been left in the care of the plaintiff’s mother. According to the defendant, this would happen when the plaintiff was upset or angry with him. The defendant confronted the plaintiff and it was agreed that whenever the plaintiff travelled without C that she would stay with the defendant and not her maternal grandmother.

[91] The parties also agreed that if the plaintiff took C with her to South Africa, then the defendant would be entitled to ‘block access’ of equal time. The defendant testified that from January 2018 he and the plaintiff had essentially shared custody and access in respect of C.

[92] The defendant testified that when C is in South Africa with the plaintiff he would have limited communication with her and experienced difficulty in having meaningful contact with her.

[93] The defendant contended that he is capable of taking care of C's physical, emotional and educational needs. He testified that he has a suitable residence with three bedrooms where the minor child would have her own bedroom. He would make sure that C goes to school and that his portion of the school fees are paid.

[94] The defendant testified that he is aware of the fact that neither his nor the plaintiff's financial position is decisive when determining C's custody but he was financially able to provide for C.

[95] He stated that although he is a South African citizen, he was granted permanent residency in Namibia and is unable to relocate back to Stellenbosch as his field of expertise is very competitive and it is not easy to enter into a new market again. The defendant testified that from past experience it is clear that finding employment in South Africa is difficult at best and he did not foresee that it would become any easier should he move back to Stellenbosch.

[96] The defendant testified that he exercised his rights and responsibilities to C in her best interests. He informed the court that his life revolves around C and it is structured in such a way as to enable him to provide her with the maximum amount of attention and care that he is able to.

[97] The defendant testified that from the time of their separation he has gone out of his way to maintain his relationship with the minor child and would spend as much time as possible with her under the circumstances. He testified that his commitment to C is further clear from the fact that he did everything in his power to be able to maintain a meaningful relationship with his daughter.

[98] On the issue of the plaintiff's intended relocation the defendant testified that the plaintiff lost sight of the fact that he is not able to travel to Stellenbosch when it suits him in order to visit C. He testified that if C lives with him he will make the necessary arrangements if he is required to work away from home but this, in any

event, does not happen often. The defendant testified that his support system consists of his mother and C's maternal grandmother, who would see to the needs of C if he is not available to do so.

[99] The defendant testified that it would be unreasonable of the plaintiff to expect him to pack up his life in Namibia and move to Stellenbosch to accommodate her. If the plaintiff was allowed to relocate to Stellenbosch with their daughter, it would have a drastic effect on C and there would be a total change in her circumstance as she would have limited access to her father and her entire support system would be taken away from her, with reference to her respective grandmothers and her maternal family.

[100] The defendant submitted that the plaintiff's proposed custody and access arrangement was impractical and unreasonable. He therefore prayed that that joint custody be granted to the parties alternatively that sole custody is awarded to him with the plaintiff having reasonable access to C in terms of the recommendations by Ms van Rooyen.

Expert reports

[101] Following on the 'affidavit to show cause' and the allegations made therein, the parties subjected themselves (on instruction of the plaintiff) to an investigation done by Ms Fritzie van Rooyen, a clinical psychologist. When Ms van Rooyen was initially approached her brief (as directed by the parties) was to consider which parent would be best equipped to have legal custody over C in light of the plaintiff's intended relocation.

[102] Ms van Rooyen delivered her first report and recommendations on 17 October 2017.

[103] As the plaintiff was not inclined to accept the initial recommendations made by Ms van Rooyen she endeavoured to involve additional experts to also conduct investigations and make their relevant recommendations, which led to the involvement of first Ms Estelle Bailey, an educational psychologist and thereafter Mr Terence Dowdall, a clinical psychologist.

[104] All three expert witnesses filed comprehensive reports in support of their respective recommendations. Mr Dowdall and Ms van Rooyen also filed comprehensive literature regarding the social sciences surrounding the issue of relocation in custody cases.

The investigation and report by Ms Bailey

[105] After receiving Ms van Rooyen's first report, the plaintiff approached Ms Bailey, who at first conducted a one-sided evaluation as the defendant initially refused to participate in the investigation. However, after the defendant had a change of heart Ms Bailey completed a combined evaluation.

[106] After conducting interviews with both parties and collaterals, Ms Bailey recommended that C stay in the primary care of the plaintiff and that she remains C's legal and custodian parent. Ms Bailey further recommended that both parents find a way to support each other in the care of their child and find a workable agreement so that conflict can subside to the best interest of C.

[107] Ms Bailey further recommended that if and when the plaintiff relocates, the couple should agree on fair, practical and workable visiting rights and contact for the defendant and that C's continuous developmental level will determine the amount of time that she stays with the defendant and away from the plaintiff. It should be noted that at the time of drafting of Ms Bailey's report the minor child was three years and four months old.

[108] Ms Bailey's recommendations were founded, *inter alia,* on the following findings:

a) C presents as a happy, satisfied girl because of her secure attachment to her parents.

b) C has a strong bond with the defendant but C's attachment to the plaintiff as her primary caregiver is observed as the strongest drive in her secure make-up because this is where she has spent the majority of her time.

c) Considering C's age, she would fare better to not have the bond with her mother disrupted at any stage and especially not at this stage.

d) The personality profiles and interviews indicate that the plaintiff is more stable, secure and predictable on an emotional and personal level. She is organised and self-disciplined. The plaintiff maintains a healthy balance between being serious and careful, as well as lively and spontaneous.

e) The defendant's personality profile on the other hand is that of a self-reliant and very introverted individual who struggles to trust others. The defendant appears to be emotionally distant and can be cold and detached in relationships. He will not exert himself over others or expect submission from them. He is a sober and serious person prone to introspection, which can border on depression.

f) The adultery that marred the parties' relationship as well as his infidelity raises questions regarding the defendant's moral grounding, his judgment and the level of reliability and trust that can be bestowed on him.

g) The defendant's efforts to discredit the plaintiff by alleging alcohol abuse should be seriously questioned. Ms Bailey labelled the defendant's conduct as deceitful.

h) The parents' (plaintiff and defendant) separation had initially been an amicable one, but since the appearance of another person in the plaintiff's life as well as her intention to relocate, the relationship between the parties had become strained.

i) The plaintiff's parenting style appears to be authoritative which allows her child space to explore but within boundaries. From research, it is known that this parenting style yields by far the most well-rounded children.

j) The defendant on the other hand seems more permissive in his parenting style, allowing C to dictate the pace and the defendant tends to follow her lead. The defendant displayed limited insight into C's developmental level. However, he is sensitive to her needs and wants to please her. This kind of parenting style is known to lead to a lack of self-discipline and a lack of strong boundaries in children.

k) The plaintiff's financial position is more stable, taking into account the support that she has from her husband.

l) The defendant's work and financial positions are less stable.

m) The best interest of the minor child was considered but Ms Bailey did not consider C's personal views as she was too young at the time.

[109] Ms Bailey did not do any follow-up evaluations and during her evidence testified that there was nothing to warrant an updated report.

[110] Ms Bailey did not engage the defendant's collaterals regarding the plaintiff's alleged alcohol abuse as all the plaintiff's collaterals said the opposite.

The investigation and report by Mr Dowdall

[111] Mr Dowdall is a clinical psychologist and lecturer of postgraduate studies at the University of Cape Town.

[112] In his report, Mr Dowdall recommended that the plaintiff should remain C's primary caregiver and that she should be permitted to relocate to Stellenbosch with C. Mr Dowdall further made recommendations regarding the reasonable access by the defendant.

[113] Mr Dowdall testified that an expert opinion in child care and contact needs to come from a base of child psychology and professional experience but that same should be anchored in common sense and practicality. He testified that in his opinion the plaintiff is fundamentally better suited in several ways to being C's primary caregiver. This opinion is founded on the following facts[8], which I will enumerate hereunder:

a) A little girl (5 years at the time) is better off growing up in a stable, well-provided family home with a capable and loving stay-at-home mother, who has always been her primary caregiver and with whom she has strong and secure bonds of affection and attachment.

b) The defendant and C also share a loving bond of affection and attachment, however, the defendant's financial position is must more precarious. The defendant must work long hours and would be much less available to C.

c) Developmentally, a child in the 5 to 10 year old age bracket needs solid exposure to a female gender role model, which the plaintiff provides.

d) Plaintiff as a married mother will be more easily accepted by the mothers of C's peers and the child's social development will be more easily facilitated, for example, through play dates, parties and sleep-overs.

e) The defendant on the other hand is a single man of over 50, who needs to work hard and would find all this much more challenging. The defendant is also not a very social person and can be described as a recluse.

f) The fundamental lessons about relationships that children absorb in their primary home matters for their sense of trust and stability in their relationships when they grow up.

[8] The final summary of Mr Dowdall's evidence. Admitted into evidence as Exhibit K.

g) It is sensible to give a child a stable base in a primary home when her relationship role models are her mother and stepfather in a supportive marriage, rather than based primarily or even 50% with a father who has a history of transient relationships and laissez-faire moral judgment and the insecurity that goes with that.

h) The plaintiff, as a married woman in a committed relationship, is less likely to make errors of judgment that could directly impact C, in comparison to the defendant.

i) In practical areas like educational support, the plaintiff is likely to be a more consistent positive influence than the defendant, given his difficult experiences and negative attitude towards school.

[114] Mr Dowdall testified the C's best interests dictate that she should be primarily based with her mother, as she has always been.

[115] Mr Dowdall testified that in his opinion the plaintiff should be permitted to relocate to Stellenbosch with C where she and her husband would be able to give C a stable home and the defendant should receive regular block contact and frequent electronic contact between visits.

[116] Mr Dowdall raised the question about the fairness of the plaintiff being compelled to forego her chance of a happy married life should C not be allowed to relocate to Stellenbosch. This would result in the plaintiff having to commute monthly between Stellenbosch and Swakopmund if she wants to continue parenting their daughter so that the defendant can continue to enjoy a particular frequency of contact with C. Mr Dowdall questioned if such a situation would be in C's best interest.

[117] Mr Dowdall submitted that if the plaintiff's application is refused and she is forced to commute it would result in C being continuously shunted between three different homes, just so that there can be a certain frequency of contact with the defendant.

[118] He also pointed out that a refusal by this court to allow the plaintiff to relocate with the minor child would require an emotional price to be paid by the minor child but would also in essence for the plaintiff to remain in service and in a supportive role to her ex-husband, who cheated on her and let her down in a number of ways. This situation would inevitably cause a feeling of resentment and unhappiness with the plaintiff which would impact C as these emotions would give rise to heightened conflict.

[119] Mr Dowdall denied that the plaintiff made herself guilty of restrictive gatekeeping and referred to the offer by the plaintiff's husband to allow the plaintiff and C to fly to Swakopmund for ten days per month, at his costs, as remarkably generous.

[120] He testified that contrary to what would be argued by the defendant and his expert, there is no convincing evidence that children suffer damage without a high frequency of physical contact.

[121] On the issue of the defendant’s past infidelity, Mr Dowdall testified that he is of the opinion that the defendant is lacking in judgment and his past actions are the best predictions of future behaviour.

[122] With regards to the plaintiff's alleged drinking habits, Mr Dowdall testified that if it was such a concern to the defendant he would have included some restrictions in the settlement agreement to safeguard the minor child. This had not been done.

[123] Mr Dowdall did not conduct a reassessment of the minor child as he deemed it unnecessary.

The investigation and report by Ms van Rooyen

[124] From the time of receiving her brief in this matter Ms van Rooyen drafted three reports. The only report which was relevant for the purposes of the hearing was the third and final report.

[125] On 18 January 2018 Ms van Rooyen filed an updated report in which she recommended that the current shared parenting arrangements should be maintained at all costs and that C should remain in Swakopmund. Ms van Rooyen further recommended that C should have regular contact with each parent and that the burden of travel should not be on C. As a result, Ms van Rooyen recommended that the plaintiff spend the same amount of time a month in Swakopmund as in Stellenbosch, alternatively that the plaintiff and her husband consider making Swakopmund the basis from where he runs his business. Ms van Rooyen recommended that the parties should have joint legal custody and should continue to co-parent in a manner that is conducive to the minor child's well-being.

[126] On 29 March 2018, Ms van Rooyen filed a supplementary report, which introduced a recommendation for a formal assessment of the minor child to be done by a neutral childcare expert, to evaluate the minor child’s developmental state and projection about adaptation to change. This recommendation did not find favour with the plaintiff or with the rest of the experts.

[127] In support of the recommendations made in her updated report Ms van Rooyen testified that regarding the general belief that when parties are conflicted joint custody is not ideal, the exact opposite applies. She testified that it in essence entails parallel parenting and not necessarily co-parenting. In response to Mr

Dowdall's evidence, Ms van Rooyen testified that primary and secondary attachment does not relate to a hierarchy in the sense of their importance.

[128] Ms van Rooyen testified that in her opinion the restrictive gatekeeping experienced from the plaintiff, especially when she is in Stellenbosch, is a stronger possibility. Ms Van Rooyen did not deem it as a pattern but was of the opinion that it exists.

[129] Regarding the defendant's affair, Ms van Rooyen deemed it as reflecting poor judgment on his part, but it should not necessarily allow one to generalise on his character. She felt confident that the defendant would not put C at emotional or physical risk. She disagreed with the other experts' views regarding his infidelity and testified that there is no correspondence between the infidelity of a parent and his or her parenting ability. Ms van Rooyen disagreed that the adultery of the defendant raised questions of his 'moral grounding, his judgment or level of reliability.

[130] Ms van Rooyen testified that the claim that the defendant was a recluse does not fit his profile. She testified that the defendant is not overly anxious at social gatherings but might feel insecure in personal relationships and is sensitive to rejection. He is loyal and values friendships and relationships with people close to him. The defendant is however sensitive to criticism and presents with insecurity and a lack of self-confidence. The defendant also experiences a heightened degree of anxiety, which may be attributed to the custody dispute, but that he may also be prone to generalized anxiety.

[131] In respect of the defendant's allegations of the plaintiff's binge drinking, Ms van Rooyen stated that she believes that the defendant made the allegations in good faith and not in an attempt to discredit the plaintiff. She equally believes that the plaintiff's drinking habit had been a genuine concern to the defendant since C's birth.

[132] On the issue of relocation, Ms van Rooyen testified that the instances where she should support relocation when:

a) The father is not involved;

b) The mother shows signs of facilitative gatekeeping;

c) The age of the child should be close to 10 years old;

d) The improvement to the child's life must be clear, relative to what she has now.

[133] Ms van Rooyen testified that her view is not that relocation should not take place at all but she is of the opinion that there are too many unpredictable elements and that the child would lose social capital as she would grieve if forced to deviate from the current arrangement. Ms van Rooyen testified that children mourn the loss of access to the other parent and their psychological wellbeing is affected, which in turn influences their psychical wellbeing.

[134] She did not take issue with the bona fides of the plaintiff to want to relocate but felt that the potential damage to the minor child would remain present.

[135] Ms van Rooyen opined that although the plaintiff would be available full day to care for the needs of the minor child and whereas this situation would count in her favour in normal custody matters, it would not be the deciding factor in the current circumstances. Ms van Rooyen testified that in normal parenting plans, a child of the age of C should ideally not be separated for more than seven days from either parent. Currently, C seemingly follows her own pattern of three/four days at each parent over holidays when both parties were in the same town. The witness submitted that relocation could be avoided.

Joint expert report

[136] On the directions of this court the experts held an expert's meeting regarding the issue of care, contact and relocation of C. The first meeting held between the experts was on 27 February 2018, with a subsequent meeting on 25 January 2019.

a) 27 February 2018 meeting: During this meeting, the experts dealt with the following issues:

i) **Allegations of alcoholism:** The experts agreed that on the evidence available to them they could not say that the plaintiff is an alcoholic and were in agreement that the allegations on alcoholism should carry no weight in the assessment.

ii) **The question of attachment between child and parent**: The experts agreed the minor child has a strong attachment with both parents, however, the parties could not agree on who the primary attachment figure was in the life of the child. In the opinion of Ms van Rooyen, there is at least equivalent attachment with both parents whereas Ms Bailey and Mr Dowdall were of the opinion that from the caregiving history and clinical observations, the plaintiff is probably the primary attachment figure.

iii) **Basic parenting capacity:** The experts agreed that both parents were capable of providing basic care for the minor child and that there were no indications that she suffered neglect in either household.

iv) **General suitability of primary parent and caregiver:** Ms Bailey and Mr Dowdall were of the view that the plaintiff was the better-suited parent to be offer the primary residence for a little girl but Ms van Rooyen did not agree with this perspective. She submitted that the maternal presumption is severely criticised and no longer the preferred position.

v) **Sustaining contact between the defendant and the minor child:** The experts agreed that there were many benefits to have both parents living in the same area, however, Ms Bailey and Mr Dowdall agreed that the negative association compelling the plaintiff to stay in Swakopmund outweighs the possible negatives of the plaintiff's relocation. Ms van Rooyen's perspective is that it would not be in the interest of C to be separated from either of her parents and that the negatives associated with the relocations

outweighed the benefits, unless the defendant could also relocate to Stellenbosch.

[137] In amplification of their view, Ms Bailey and Mr Dowdall argued that if the defendant relocated to Stellenbosch as well, which is an option as the defendant is a South African citizen, it would mean that it would obviate the severe problems that would arise from the plaintiff being obliged to give up her normal married life to stay in Swakopmund.

[138] During January 2019 the experts filed an updated report. Mr Dowdall did this without a follow-up report and Ms Bailey briefly evaluated the plaintiff and the minor child. The experts only agreed on limited issues and due to the effluxion of time only certain of these issues are still relevant at the time of writing this judgment. Their issues are as follows:

a) Since the inception of the case the plaintiff got married and no longer has business interests in Namibia:

(i) Mr Dowdall and Ms Baily felt that these developments strengthened the case to be made that the plaintiff should be permitted to relocate with the minor child to Stellenbosch, given the greater level of certainty and commitment evident in her situation. Ms van Rooyen however held the view that this aspect has no bearing on the case at hand and was further of the view that the plaintiff made up her mind to move to Stellenbosch, irrespective of the outcome of the court proceedings.

(ii) C's contact with her father continued over the year 2018 and the plaintiff permitted increased contact with the minor child. According to Ms van Rooyen's calculation, the overnight time spent with the defendant increased over the 14 months preceding the meeting and she believed that it added weight to the argument that the relocation should not be allowed.

b) The defendant's mother relocated to Namibia and is residing with the defendant.

c) The defendant's work arrangements changed. At the time of the drafting of the joint expert report, the defendant was no longer in permanent employment but had a sub-contract. (It should be noted that this position changed further due to COVID -19 the sub-contract contract also fell away).

d) At the time of the report, the defendant was not in a permanent romantic relationship, but had an intimate relationship for approximately 3 months during 2018 with one MB. The minor child had met MB as she and the defendant were still friends. Ms MB was the only girlfriend of the defendant to be introduced to C.

Bias alleged against the experts

[139] During the trial much criticism was levelled against the evidence of Ms Bailey as well as Ms van Rooyen as being biased in favour of the party in whose favour they were testifying.

[140] Both Mr Jones, on behalf of the defendant (who appeared on behalf of the defendant at the time) and Mr Mouton, on behalf of the plaintiff, held the view that the respective experts were advocating for their ‘clients’.

In respect of Ms Bailey

[141] At one stage during cross-examination of the plaintiff, the plaintiff became emotionally upset and Ms Bailey took it upon herself to console the plaintiff in the bathroom.

[142] During cross-examination counsel also took issue that Ms Bailey failed to consult the defendant’s collaterals regarding the plaintiff’s drinking habits as she decided that they will in any event deny the allegations. The issue that Ms Bailey and the plaintiff are Facebook friends was also raised during cross-examination

In respect of Ms van Rooyen

[143] In respect of Ms van Rooyen, Mr Mouton raised several issues which were in his opinion an indication of her bias, for example, her constant following up on the

defendant, but her failure to conduct any or no follow ups in respect of the plaintiff. Ms van Rooyen also supplemented and updated her initial report twice without having been instructed to do so.

[144] Mr Mouton argued that Ms van Rooyen's reluctance to make obvious concessions in favour of the defendant indicated her lack of objectivity. Mr Mouton also argued that Ms van Rooyen relied on the version of defendant and his collaterals regarding the plaintiff's alleged drinking despite the fact that the collaterals that were consulted were not in the position to confirm or verify any of the allegations in his affidavit to show cause, as such allegations related to events post-separation.

[145] In *Schneider NO & Others v Aspeling & Another*[9] Davis J discussed the issue of experts as follows:

'In this connection, it is necessary to deal with the role of an expert. In Zeffertt and Paizes, *The South African Law of Evidence (*Second Edition), at 330 the learned authors, citing an English judgment of *National Justice Compania Navierasa v Prudential Assurance Co Limited* 1993(2) Lloyd's Reports 68 at 81, set out the duties of an expert witness thus:

"1. Expert evidence presented to the Court should be, and should be seen, to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;

2. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise. . . An expert witness should never assume the role of an advocate;

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion;

4. An expert witness should make it clear when a particular question or issue falls outside his expertise;

5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."

[9] *Schneider NO & Others v Aspeling & Another* 2010 (5) 203 WCC at 211E-J to 212A-B.

In short, an expert comes to Court to give the Court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the Court with as objective and unbiased opinion, based on his or her expertise, as is possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific, knowledge which that expert claims to possesses.'

[146] Impartiality of expert witnesses means that such experts operate within scientific principles and legal procedures. By doing so, they assist the trier of fact. There are two aspects to the requirements for the impartiality of expert witnesses: the individual perspective and the industry perspective.

[147] I cannot fault either one of the experts in respect of their specialised knowledge, training or experience. However, I do think at times both these experts, Ms van Rooyen and Ms Bailey, allowed their personal perspectives to get the better of them. There might be a perceived bias on the part of these experts however I am satisfied that it cannot be said that either of them were partisan in the sense that 'they consistently asserted the cause of the party'[10] that engaged him or her. The experts might be criticised for the way in which they conducted their investigations but both of them were subjected to rigorous cross-examination which lasted for days and the reasons for their findings and the way in which they conducted their investigations were properly tested.

[148] Although the respective counsels may not agree with the opposing parties' respective experts and their interpretation of the social sciences, I cannot find that either was blatantly biased.

[149] I am satisfied that the respective experts applied techniques for establishing their psychological opinion appropriate to the instructions received. It is so that the tests applied in respect of the individual/family being assessed will vary between

[10] *Stock v Stock* 1981 (3) SA 1280 (A) at 1296 E-F.

psychologists, who may have differences in theoretical orientation and approach. That much was quite clear from the evidence before me.

[150] I am satisfied that there is no reason to disregard the evidence of either Ms Bailey or Ms van Rooyen. Opinions of experts in this specific field of social sciences are often in conflict. The current case is no exception.

Onus

[151] There is no onus in the conventional sense on the party applying for an order to prove that relocation is the best interest of the child[11] in the sense that the matter involving children are dealt with as judicial enquiries in which the court seeks to determine the child's best interest.

[152] In *Cunningham v Pretorius*[12] the court held that 'when assessing the case of each party, to determine the issue at hand (invariably whether it is in the best interests of the child to relocate) with reference solely to whether or not the applicant has discharged his or her burden, evidentiary or overall, on a balance of probabilities so as to entitle him or her to the relief sought. The incapacity or otherwise of a parent litigant to discharge an evidentiary onus should not be conclusive as to what may or may not be in the best interests of the child.'

Relocation

[153] Relocation is commonplace after divorce and where one parent refuses to grant consent to the other parent to relocate internationally, or cross-border as is the case before me, the High Court as the upper guardian of all minors, must be approached for an order allowing such relocation.

[154] It is common cause that the experts agreed that it would be ideal and in the child's best interest to have both her parents in close proximity to each other, but the

[11] *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) at 437G-H.
[12] *Cunningham v Pretorius* 31187/08 2008 ZAGPHC 258 21 August 2008 at para 9.

reality is much different as a court cannot ever force divorced parents to live in close proximity to each other in order for either parent to live in close proximity to the child. Our courts have not been appointed as guardians of adults and parents who are not the prisoners of our courts[13].

[155] The legal principles applicable in relocation cases were set out in the majority judgment of Scott JA in *Jackson v Jackson*[14] and these legal principles were adopted in our jurisdiction by Botes AJ in *NS v RAH*[15]. The court in the *Jackson*[16] matter set out the principles as follows:

'It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be *bona fide* and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same and, while past decisions based on other facts may provide useful guidelines, they do no more than that. By the same token, care should be taken not to elevate to rules of law the *dicta* of Judges made in the context of the peculiar facts and circumstances with which they were concerned.' (emphasis added).

[156] The legal principles as set out in the *Jackson* matter were also adopted in *F v F*[17] wherein Maya AJA (as she then was) stated the following:

'[10] In deciding whether or not relocation will be in the child's best interests the court must carefully evaluate, weigh and balance a myriad of competing factors[18], including

[13] Unreported decision of *Wolters v Bensch* Gauteng Local Division Case 22987/2015 delivered by Satchwell J on 16 November 2016.
[14] *Jackson v Jackson* 2002 (2) SA 303 (SCA) para 2 at 318E-I.
[15] *NS v RAH* Unreported Case number I 1823/2008 delivered on 8 April 2011.
[16] *Jackson* supra at footnote 14 above.
[17] *F v F* 2006 (3) SA 42 (SCA) para 13.
[18] *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C).

the child's wishes in appropriate cases[19]. 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*[20], 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*[21]:

> "[T]his is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside; indeed, the Court takes upon itself a grave responsibility if it decides to override the custodian parent's decision and the emotions or impulses which have contributed to it."[22]

The reason for this deference is explained in the minority judgment of Cloete AJA in the *Jackson*[23] 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[24]. Thwarting a custodian parent in the exercise of these rights may well have a

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

[20] *Bailey v Bailey* 1979 (3) SA 128 (A).

[21] *Du Preez v Du Preez* 1969 (3) SA 529 (A) at 532E-F.

[22] *Ibid* at 136B-C.

[23] *Jackson supra* at footnote 14 para 34 at 317E-F.

[24] Sections 10, 14 and 21 of the South African Constitution.

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 Sarah 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 Sarah' did not deserve 'any attention' and that '[i]n arriving at a just decision [a court] cannot be held hostage to the feelings of aggrieved litigants'.

[12] It is also important that courts be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts - who have no reciprocal legal obligation to maintain contact with the child and may relocate at will[25] - may, and often does, indirectly constitute unfair gender discrimination. Despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender-based[26].It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce. The refusal of relocation applications therefore has a potentially disproportionate impact on women, restricting their mobility and subverting their interests and the personal choices that they make to those of their children and former spouses[27]. As was pointed out by Gaudron J in a minority judgment in *U v U*[28], the leading Australian case on relocation:

"…it must be accepted that, regrettably, stereotypical views as to the proper role of a mother are still pervasive and render the question whether a mother would prefer to move to another state or country or to maintain a close bond with her child one that will, almost inevitably, disadvantage her forensically. A mother who opts for relocation in preference to maintaining a close bond with her child runs the risk that she will be seen as selfishly preferring her own interests to those of her child; a mother who opts to stay with her child

---

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

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

[27] See Bonthuys op cit 501-506 14 [2002] HCA at para 36.

[28] *U v U* [2002] HCA 36 at para 36.

runs the risk of having her reasons for relocating not treated with the seriousness they deserve."

[13] While attaching appropriate weight to the custodian parent's interests, courts must, however, guard against 'too ready an assumption that the [custodian's] proposals are necessarily compatible with the child's welfare'[29]. The reasonableness of the custodian's decision to relocate, the practical and other considerations on which such decision is based, the extent to which the custodian has engaged with and properly thought through the real advantages and disadvantages to the child of the proposed move are all aspects that must be carefully scrutinised by the court in determining whether or not the proposed move is indeed in the best interests of the child.'

The different schools of thought in respect of relocation

[157] From the literature available there appear to be two schools of thought when it comes to relocation cases. These are a) pro-relocation approach and the b) neutral approach[30].

Pro-relocation approach

[158] According to Boyd MT[31] this approach has a presumption in favour of allowing the primary caregiver to relocate. The cases discussed in this section are limited to the most important cases, where the primary caregivers are favoured to the extent that the relocation applications are usually granted in their favour.

[159] Boyd referred to *Van Rooyen v Van Rooyen*[32] which depicts a presumption in favour of the primary care-giver. The court in *Van Rooyen* considered two preliminary issues in deciding the matter, i.e. a) firstly is how the courts approach such matters (in essence this entails that the court will evaluate, weigh and balance the considerations and competing factors relevant to the decision to determine

[29] *Payne v Payne* [2001] 1 FLR 1052 (CA) para 40 (per Thorpe LJ).
[30] Domingo W 'For the Sake of the children': South African Relocation Disputes' *PER* (2011) 14(2) 156 at para 4**;** Boyd MT The determinant's of the child's best interests in relocation disputes, 2015, Mini-thesis submitted in partial fulfilment of the requirements for the degree LLM in Children's Rights, University of the Western Cape at para 3.4.1.
[31] Supra at para 3.4.1.1
[32] *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C).

whether the proposed move will be in the child's best interests), and b) secondly in deciding the application, the motivation of the mother is a deciding factor to be determined by the courts[33].

The neutral approach

[160] According to Domingo W in his paper 'For the Sake of the children': South African Relocation Disputes[34], the neutral approach is when there is neither a presumption in favour of or against relocation and a court applies a fresh inquiry into each case as it arises. In other words, the approach is to accept no presumptive right of either parent to move or block a move. According to the author matters should be considered on a case by case discretionary basis and courts need to review a proposed move in terms of the child's welfare and interests[35].

[161] The author made further reference to *Cunningham v Pretorius*[36], wherein the court took into account the new family law framework set out in the South African *Children's Act* and where Murphy J held that in deciding relocation disputes:

> 'What is required is that the court acquires an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the court must render a finding of mixed fact and opinion, in the final analysis a structured value-judgment, about what it considers will be in the best interest of the child.'

[162] Domingo contends that from the above it appears that both parents are placed on an equal footing and their interests are balanced fairly against the child's best interests and same accords with the neutral approach. He further contended that the neutral approach is also more in line with the *Children's Act* (South African). With the paradigm shift to the idea of shared parenting, the question has changed from being "*which parent will the child live with?"* to "*how will the child's time be*

[33] Supra at footnote 28.
[34] Supra at footnote 31.
[35] Supra at p 156 to 157.
[36] *Cunningham v Pretorius* 31187/08 2008 ZAGPHC 258 21 August 2008 at para 9

shared between the parents?" There should therefore be no presumption in favour of either the relocating parent or the non-relocating parent[37].

[163] In South Africa, unlike in Namibia, there is a legion of cases relating to the relocation of minor children. Some cases deal with international relocations and others deal with relocation from one province to another within the borders of South Africa. I find it appropriate to investigate the South African court's approach in some of these cases.

Jackson v Jackson[38]

[164] As indicated the leading case in respect of relocation of a minor child in South Africa is the *Jackson* matter and although this matter dates back to 2002 I am satisfied that the legal principles set out therein are still apposite today.

[165] In the *Jackson* matter the court had to decide whether it would be in the best interest of the two daughters of nine-and-a-half and seven respectively of the parties to emigrate with their father to Australia, whilst the mother remains in South Africa. The father as the primary caregiver of their daughters had custody, whereas the mother as non-custodian parent had generous rights of access to the two girls. After the divorce, the plaintiff wanted to emigrate to Australia with the children but the mother refused to give her consent for the removal of the children. The majority court held that the move to Australia would damage the children's relationship with the mother and that it would not be in their best interests to relocate to Australia with their father.

[166] In the majority judgement Scott JA found that of particular importance in this case is the fact that there was no real separation between the mother and the children.

---

[37] Supra at footnote 27 at p 158.
[38] *Jackson* supra at footnote 14 above.

[167] Scott JA also found that that generally, following a divorce, if a custodian parent wishes to emigrate, a court will not lightly refuse leave for the children to be taken out of the country, if the custodian parent's decision is bona fide and reasonable. Scott JA went on further to say that this is not because of the so-called rights of the custodian parent but it is because in most cases, even if custody by the non-custodian parent is materially affected it would not be in the best interest of the children that the custodian parent be thwarted in his or her desire to emigrate in pursuance of a decision reasonably and genuinely taken. In many instances such refusal may result in bitterness and frustration which would adversely affect the children. However, the learned judge made it clear that each case must be decided on its own particular facts as no two cases are the same and past decisions based on other facts may be useful by providing guidelines but no more than that.

Cunningham v Pretorius[39]

[168] In *Cunningham* the court had to decide whether or not to grant the relocation of the child (with a learning disability) with the mother (primary caregiver) to the United States. This matter is to a certain extent similar to the matter before me.

[169] The minor child involved in the *Cunningham* matter had lived most of his live with his mother and she was his primary caregiver. The mother of the child fell in love with a foreigner and she wanted to join her new husband to forge a better life for her and the minor child. The respondent did not attack the bone fides of her reasons for wishing to relocate but the reasonableness of her decision. He was of the opinion that the decision was not properly thought through and although he conceded that the minor child would have the prospect of better opportunities in the USA, the impact of the move on the minor child's language difficulties would impede his academic development. The applicant would have a limited support network in the USA and it would therefore be difficult to maintain the positive memories of his significant attachment figures. The respondent also questioned the stability of the applicant's relationship with her new husband.

[39] *Cunningham* supra at footnote 12 above.

[170] The court took into account the following factors to determine the relocation application[40]:

(a) 'the *bona fides* and reasonableness of the mother's decision and;

(b) the mother's freedom of movement.

[171] The court held that she should not be compelled to choose between her child and second marriage.

[172] In its analysis of the matter, the court weighed and balanced the reasonableness of the custodian's decision to relocate, the practical and other considerations on which such decision is based, the competing advantages and disadvantages of relocation, and how relocation would affect the child's relationship with the non-custodian parent. However, ultimately the court found that it must be guided principally by what will be in the best interests of the child[41].

[173] In both aforementioned matters the court followed the neutral approach. I am in agreement that no presumption should operate in favour of either party and that the case should be decided in context of the Constitution and the Child Care and Protection Act[42] (the Act), which deals with the best interest of the child. I am therefore fully associating myself with the neutral approach as set out above and will consider the facts of this matter against relevant legal principles.

Research literature and social sciences

[174] A substantial body of research literature on the effects of relocation of children of divorce was presented to court. The majority of the literature provided to court emanates from the United States of America and I was referred to the research of renowned authors and social scientists such as Sanford Braver, Ira Ellman and William Fabricius (Braver *et al*); Judith Wallerstein and Richard Warshak. What is

[40] Ibid at para 63-64.
[41] Ibid at para 9.
[42] Child Care and Protection Act 3 of 2015.

striking from reading the literature is the difference in opinions and in some instances criticism regarding the methodology applied and opinions formed.

[175] While social science research applicable to child custody and relocation definitely has an important place in the greater scheme of things and can be of assistance to court, I am of the view that one must be cautions as there is a danger in over-interpreting research findings.

[176] There is limited number of longitudinal studies relating the effect of relocation on the minor child and the body of work available on these studies are by foreign authors.

[177] Satchwell J commented in *B v M*[43] in this regard as follows:

> 'We … cannot ourselves make the leap from experiences in the United States or Canada to the South African situation since we have no knowledge of the extent to which the research is locality specific or culture based. Its relevance to the South African experience in general or to this litigation in particular has not been outlined to us.'

[178] I am in agreement with the views of the Satchwell J in this regard. It must however be understood that I am by no means discounting the value of well-researched opinions of the mental health professional referred to above, nor do I wish to overemphasise cultural or geographic specifics, but I am of the opinion that research that is locality specific or cultural based for our purposes would be of more assistance to our courts to reach a decision.

[179] It is my considered view that the literature presented during the course of the trial should not be viewed as creating a basis for a bias or legal presumption against relocation. A risk prediction for a minor child in the case of relocation finds its basis in speculation. It is nothing more and can surely not be deemed as determinative of the outcome of such relocation.

[180] Each case is fact driven and should be considered on its own merits. From my understanding of the authorities and the relevant legislation there is no legal

[43] *B v M* 2006 (9) BCLR 1034 (W) at para 53.

standard for or against relocation. I could also not find any legislative guidance on the issue of relocation in Namibia. In fact, there a limited number of cases in our jurisdiction that deal specifically with the issue of relocation of a minor child, either cross-border or internationally.

Primary parent versus primary attachment figure

[181] During the course of the evidence of the respective experts a lot of time was spent on who they identified as the primary attachment figure and who was the primary care giver in C's life.

[182] From my reading of the relevant authorities it is clear that in Namibian law, as in South African, the practice of simply identifying whomever is the 'primary parent' or the 'primary caregiver' has not been adopted as a determinative of an enquiry of the current nature[44]. The courts adhere to no presumption save for the ultimate test of the 'best interest of the child'.

Best interest of the child

[183] Article 15 of the Namibian Constitution states as follows:

'(1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.'

[184] The Child Care and Protection Act[45] (the Act) must be read in conjunction with the Namibian Constitution to give effect to the rights of children as contained in the Namibian Constitution. The object of the Act is, amongst other things, to:

a) protect and promote the well-being of all children[46];

b) promote the protection of families and actively involve families in resolving problems which may be detrimental to the well-being of the children in the family[47].

[44] Unreported decision of Wolters v Bensch, Gauteng Local Division Case 22987/2015 delivered by Satchwell J on 16 November 2016.
[45] Child Care and Protection Act 3 of 2015.
[46] S 2(1)(a) of the Act.
[47] S 2(1)(d) of the Act.

[185] The Legislature further developed the 'best interest' principle within the framework of the Act wherein it addresses a range of major issues affecting children.

[186] Section 3 of the Act sets out what must be considered in all matters concerning the care, protection and well-being of a child arising under this Act or under any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general, the best interests of the child concerned is the paramount consideration.

[187] The factors to be taken into consideration for determining the best interests of the child, where relevant, are[48]:

'(a) the child's age, maturity and stage of development, sex, background and any other relevant characteristics of the child;

(b) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(c) views or opinions expressed by the child with due regard to the child's age, maturity and stage of development;

(d) the right of the child to know and be cared for by both parents, unless his or her rights are persistently abused by either or both parents or continued contact with either parent or both parents would be detrimental to the child's well-being;

(e) the nature of the personal relationship between the child and other significant persons in the child's life, including each of the child's parents, any relevant family member, any other care-giver of the child or any other relevant person;

(f) the attitude of each of the child's parents towards the child and towards the exercise of parental responsibilities and rights in respect of the child;

(g) the capacity of the parents or any specific parent or of any other care-giver or person to provide for the needs of the child, including emotional and intellectual needs;

(h) the desirability of keeping siblings together; (i) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –

[48] S 3 of the Act.

(i) both or either of the parents; or Republic of Namibia 18 Annotated Statutes Child Care and Protection Act 3 of 2015;

(ii) any brother or sister or other child or any other care-giver or person, with whom the child has been living;

(j) the practical difficulty and expense of a child having contact with the parents or any specific parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents or any specific parent on a regular basis;

(k) the need for the child to maintain a connection with his or her family, extended family, culture or tradition;

(l) any disability that the child may have;

(m) any chronic illness from which the child may suffer;

(n) the need for the child to be brought up within a stable family environment and where this is not possible in an environment resembling as closely as possible a caring family environment;

(o) the need to protect the child from any physical or psychological harm that may be caused by –

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation;

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person; or

(iii) any family violence involving the child or a family member of the child; (p) the need to avoid or minimise further legal or administrative proceedings in relation to the child; and

(q) any other relevant factor.'

[188] The list of factors to be determined is extensive but it is important to understand that not all these factors need to be determined in every case because what is in the best interest of a child can vary greatly from one family unit to another, depending on a multitude of factors.

Plaintiff's motive to relocate

[189] The plaintiff remarried in 2018 and has since then been unable to settle into her new matrimonial home as she has been commuting between her home in Swakopmund and their common home in Stellenbosch.

[190] It was suggested on behalf of the defendant that as the plaintiff's new husband has the financial ability to commute that he should conduct his business from Swakopmund and the couple should settle permanently in Swakopmund rather than Stellenbosch.

[191] It is my understanding that PH, husband of the plaintiff, has extensive business interests in Stellenbosch and is unable to relocate permanently to Swakopmund at this stage, although it is the plan that the couple intend to settle in Swakopmund once PH retires.

[192] The reason for the plaintiff wanting to relocate is in my view rather straight forward. She wants to go on with her new life and she wants C to be part of that of that life, which includes being part of a close-knit family structure and secure family environment.

[193] I am quite satisfied that the plaintiff's reason for wanting to relocate is reasonable and bona fide. Despite earlier acrimony between the parties I cannot find that plaintiff's motivation for relocation is to frustrate the access rights to the defendant.

<u>The defendant's opposition to the plaintiff relocating with the minor child</u>

[194] The defendant was of the view that if the plaintiff is allowed to relocate with C that his relationship her will suffer irreparable harm as he would have limited access to her due to his financial inability to travel to Stellenbosch and visit her there for extended periods of time.

[195] The defendant criticised the plaintiff decision, stating that she was putting her own personal needs above that of the minor child by wanting to relocate. In response to the proposal that he move back to South Africa, the defendant testified that it would be unreasonable of the plaintiff to expect him to pack up his life in Namibia and move to Stellenbosch to accommodate her.

[196] The defendant raised the concern that even if he relocates to Stellenbosch as well there are no guarantees that he will see her as it has happened in the past when C was out of town with the plaintiff that he would try and FaceTime C but his attempts were ignored and he would then have to send a text message demanding to speak to the minor child.

[197] The defendant also raised the issue of restrictive gatekeeping with Ms van Rooyen and expressed his concern that this may persist or get worse when the plaintiff relocates with the minor child.

[198] Despite an undertaking by the plaintiff that she will not withhold information from him regarding C, the defendant stated that he does not accept that the plaintiff will keep to her undertaking because she had previously enrolled the child at a Montessori school in Stellenbosch, right at the beginning of the enquiry, and did so without informing him or acknowledging him before doing so. Upon making enquiries with the school he was informed that his name did not appear on their records.

[199] The defendant further raised his concern that in the event that the plaintiff does not comply with the court's order regarding access, he would have to enforce his rights to access in a foreign court, which would be extremely costly.

Allegations of restrictive gatekeeping

[200] Any decision regarding relocation must inevitably be subjected to a careful and appropriate consideration of the best interests of the child, which must include a consideration of the nature and extent of contact possible with the non-custodian parent if relocation is permitted.

[201] Ms van Rooyen addressed the issue of restrictive parental gatekeeping in her report and stated that although she would not say that that is the case all the time, parental gatekeeping took place in the current matter none the less.

[202] My understanding of parental gatekeeping refers to parents' attitudes and actions that serve to affect the quality of the other parent's relationship and involvement with the child. Patterns or subtypes of gatekeeping are defined as facilitative, restrictive, and protective.

[203] The plaintiff is alleged to be a restrictive gatekeeper and over and above the incidents regarding the telephonic contact with C the defendant pointed out two specific past incidents that would allegedly be indicative of the said behaviour. These two specific past incidents were when:

a) the plaintiff restricted the defendant's access to the minor child on the day when she confronted him about the affair with CS; and

b) the plaintiff went to Stellenbosch and left the minor child with her mother instead of the defendant.

[204] From the evidence before me it appears that on the date of the incident between the plaintiff and the defendant, when she confronted him about the affair with CS, the defendant had come to fetch C, but tempers flared during the confrontation and the plaintiff stormed away. The defendant then jumped over the wall and banged on the sliding glass door. C was crying and the defendant was not allowed to have access to her.

[205] This restriction lasted for two days, whereafter the defendant was allowed to see C again. According to the plaintiff the defendant's aggressive behaviour on the day was what prompted her to make the decision to restrict his access to their daughter, but after she had the opportunity to reflect on the situation, she realised that it would not be in the best interest of the minor child to keep the defendant away from her.

[206] The time when the plaintiff left C with her mother and travelled to Stellenbosch was another instance referred to by the defendant with regards to her gatekeeping. It would appear that after a phone call to the plaintiff they agreed that he would fetch C from the grandmother and she then stayed with him for the duration of the plaintiff's stay in South Africa.

[207] Ms van Rooyen testified that the defendant reported to her that this happened often that C was left with her grandmother but there is no evidence before court to that effect.

[208] In respect of the phone calls/FaceTime where the defendant was 'ignored' by the plaintiff it would appear that the plaintiff and family had limited cell phone reception.

[209] In order to address this issue the plaintiff's husband indicated to the defendant that if he is unable to get hold of the plaintiff then he could contact him on his (PH's) phone to have access to C. The defendant elected not to take PH up on this offer.

[210] When confronted during cross-examination by Mr Mouton about any other incidences of gatekeeping the defendant testified that he would ask for extensions, i.e. that C could sleep over if she fell asleep whilst at his house or to take her back on a Monday morning after a weekend. The plaintiff was however strict in enforcing the terms of the interim settlement agreement.

[211] From the evidence before me I cannot find that the plaintiff can be typified as a parental gatekeeper. The incidences that the defendant relies on for his allegations of restrictive gatekeeping do not have merits. In fact, in the defendant's own words he and the plaintiff have a flexible arrangement in respect with contact with C.

[212] Further to this the plaintiff for instance had no issue that if she travelled with C that the defendant would get the corresponding uninterrupted time with the minor child, in spite of the fact that there was no specific provision in the interim custody agreement to accommodate such an agreement.

[213] I am of the opinion that the defendant's fear that the plaintiff would make herself guilty of restrictive gatekeeping in the event of being granted leave to relocate with the minor child is unfounded. In any event C has a cell phone of her own now and the defendant would have liberal telephonic/FaceTime access to her.

Discussion and application of the law to the facts

[214] From the evidence before me C is a happy and content little girl. She will turn seven in September 2021 and appears to be a well-balanced child with an active life involving friends, school, swimming-, piano- and dance lessons.

[215] She has been living with the plaintiff and has been in her care from her date of birth. She is loved by both her parents and is dancing to her own tune, moving between the home of the plaintiff and that of the defendant.

[216] It would appear that in spite of the trauma of the divorce and separation when the defendant moved out of the common home she has been coping well with the change in her circumstances.

[217] The plaintiff and defendant are both undoubtedly committed to their daughter and each one of them carries her best interest at heart. However, there are competing considerations between the reasons advanced for the relocation and the objection thereto, which must be carefully considered and weighed[49].

Parent's abilities

[218] First and foremost, I must say that I do not believe that there is such a thing as a perfect parent. The court's quest is to find what has been called 'the least detrimental available alternative for safeguarding the child's growth and development'[50].

---

[49] *NS v RAH* Case number 1823/2008 delivered 8 April 2011.

[50] *Potgieter v Potgieter* [2007] SCA 47 (RSA) Van Heerden JA referred to Joseph Goldstein, Anna Freud & Albert J Solnit *Beyond the Best Interests of the Child* (1973) p 53, as cited in Boberg's Law of Persons and the Family 2 ed (1999) p 528-529 n 117.

The plaintiff

[219] At the date of judgment, the plaintiff has been married to PH for almost three years. One can accept that the marriage is no longer in the honeymoon phase and all concerned accept that the couple appears to have a solid relationship.

[220] The plaintiff will have no need to work if she permanently relocates to Stellenbosch as PH is an affluent business man. The financial needs of the minor child would therefore be satisfied.

[221] The plaintiff has been the caregiver and the nurturer of the minor child from her birth and although the defendant has liberal custody, C has been in the plaintiff's custody since November 2016.

[222] The plaintiff's evidence is that living in Stellenbosch would be beneficial to C as she would grow up in a stable family context with two parental figures that love each other.

[223] The plaintiff submitted that the minor child would have greater access to resources which are more readily available in Stellenbosch than in Swakopmund e.g. cultural facilities and quality educational facilities.

[224] The plaintiff submitted that C would have greater stability with her and her husband in Stellenbosch than what she would have with the defendant as a single parent.

[225] Ms Bailey described the personality type of the plaintiff extroverted, sociable, stable, balanced and well-organised, which is consistent with the plaintiff's success as a business women and sportsperson. Mr Dowdall described the plaintiff as a warm parent who easily anticipated possible hazards of C and forestalled any injury, engaged in a positive way with the child, was affirming and affectionate but could exercise discipline in a reasoned way and affirmed the autonomous behaviour of the child. He regarded her as a very capable mother.

[226] Ms Bailey described the plaintiff's parenting style to be authoritative which allows her child space to explore but within boundaries.

The defendant

[227] In his counterclaim the defendant prays that sole custody be awarded to him in the event that the plaintiff persists with her intended relocation.

[228] The defendant no longer has fixed employed and the exact nature of his income at the time of writing this judgment is unclear. The defendant however indicated that since he is doing artwork on commission for European clients his income has increased.

[229] Due to his work conditions the defendant has to work long hours. During those hours C would be staying with his mother, who is an elderly lady. His mother does not have a driver's licence and therefore the plaintiff's mother would have to assist and do the school runs or transport C if the defendant is unable to do so.

[230] The defendant testified that his father and a cousin are relocating to Swakopmund, however it is not clear what role they would play in the care of C, if any.

[231] The evidence of Mr Dowdall and Ms Bailey is that the defendant is an introvert or even recluse.

[232] According to the experts the defendant is prone to depression and anxiety especially when things do not work out the way he expected.

[233] The defendant is single and does not have the support system of a spouse and would have to rely on the elderly grandmothers, both maternal and paternal, for assistance with C when the need arises.

[234] According to Ms Bailey the defendant seems to be permissive in his parenting style which can lead to a lack of self-discipline and a lack of strong

boundaries. She was further of the opinion that the defendant displayed limited insight into C's developmental level. Mr Dowdall's impression of the defendant was that he is a capable father and is vigilant and aware of the child's safety.

The child's attachment to her parents

[235] All the experts agree that C has a strong attachment to both her parents and can therefor transition between their respective homes with ease.

[236] The plaintiff appears to have been the more consistently present parent over C's lifetime and the majority of the time she slept at her mother's home and that according Mr Dowdall is directly related to where she will experience her secure base to be located.

[237] The defendant is a loving parent but his longer working hours would keep him away from C for longer periods of time.

[238] This position has changed to some extent during the time that the plaintiff commuted between Swakopmund and Stellenbosch resulting in C spending more time with her father.

Discussion

[239] The personality profiles of the parents are directly opposed to each other. On the one hand we have a mother who is described as an extrovert and an outgoing person who would have no trouble in interacting with other parents and organising parties and sleepovers and who will have a positive impact on C social development.

[240] On the other hand, the defendant is described as an introvert or recluse and add to that the fact that the defendant is a 50 year old single male, one must question how that would impact C and her social development. Mr Dowdall voiced his concern in this regard and questioned how easily the mothers of C's peers would accept sleepovers for example at the defendant's house and how easily he will be able to facilitate playdates, parties, etc. as a result of this personality traits. If the

defendant is unable to overcome this adversity it will surely impact on the minor child's social and cultural development, should she remain in his custody.

[241] A further fact that is of concern is that the defendant is prone to depression or anxiety, which has the potential to negatively impact the minor child's emotional security.

[242] One can also not lose sight of the fact that although C is now still a little girl, however little girls grow up and by remaining in the care of the defendant she would grow up without a positive female role model, which in turn may negatively impact her development.

[243] The defendant is not married or in a relationship where C would be exposed to the positive female role model that she needs while growing up. It would appear that the defendant ended the relationship with MB in favour of a platonic friendship, apparently in order make C feel secure in the knowledge that her father is there for her, and also because he noticed that C became very possessive over him during the course of his relationship with MB. The defendant took the decision to make C's emotions his priority. The defendant in as many words testified that C is the centre of his universe, which one can imagine to be emotionally demanding and draining on a little girl. I understand the sacrifice that the defendant has made by wanting to focus all his energy on his daughter but that cannot be a healthy situation for either him or C if he has no life beyond this little girl.

Allegations of alcoholism and sexual exploits

[244] I wish to deal with the issues of alleged alcoholism and sexual exploits separately because it has direct impact on the well-being of the minor child.

[245] During cross-examination the defendant conceded that the plaintiff is a good mother, yet when he filed the affidavit to show cause he portrayed the plaintiff as a functional alcoholic and a binge drinker that would start drinking on Thursday afternoon and then 'pick-up speed towards the weekend'. The defendant alleged that the plaintiff would go out and consume copious amounts of alcohol and she

would drive with the minor child in the car whilst under the influence of alcohol. The defendant also stated in the affidavit that the plaintiff would leave C with her mother who allegedly also consumes excessive amounts of alcohol.

[246] When confronted with the contents of this affidavit the defendant denied having made the allegations in respect of the plaintiff and placed the blame at the door of his erstwhile legal practitioner. I fail to understand the explanation advanced by the defendant as the affidavit to show cause is an affidavit under oath which the defendant signed thereby confirming the truthfulness thereof.

[247] The experts, having investigated the allegations of alcoholism and having consulted with the collateral sources of information, were *ad idem* that on the evidence available to them these allegations could not be confirmed and agreed that the allegations on alcoholism should carry no weight in the assessment.

[248] Mr Basson who was called to testify on behalf of the defendant regarding the plaintiff's drinking habits cannot be the measure by which to gauge the plaintiff's drinking habits. He saw her twice at a social events and spoke to her thrice on the phone. Mr Basson testified that the plaintiff had too much to drink in his view but he did not see her pass out as she went to bed early.

[249] Interestingly enough, the affidavit to show cause and the allegations contained therein are in essence the reason why this enquiry turned into a long and protracted hearing. It is therefore difficult to understand that after all the allegations in respect of the plaintiff's so called drinking habits the defendant, is now no longer concerned about it. He is no longer worried about the plaintiff's drinking habits and now regards the maternal grandmother, whom he alleged to also have an alcohol problem and who would become drop-down drunk, a major part of his support system, should custody be awarded to him.

[250] Ms van Rooyen testified that the defendant had a bona fide concern for the wellbeing of the minor child when he told her about the plaintiff's drinking habits. I unfortunately have my doubts about the defendant's bona fides in this aspect. If he was so concerned one would have expected the defendant to incorporate specific

terms into the settlement agreement to secure the safety of the minor child. Yet in spite of the allegations of the plaintiff being an alcoholic the defendant conceded to the plaintiff having custody of C.

[251] I must add at this juncture that the plaintiff has never made it out that she did not have a glass or two of wine but there is a big difference between being a binge drinker and alcoholic, and a social drinker.

[252] I must therefor ask myself what has changed since the divorce, why does the defendant now have a sudden change of heart regarding the plaintiff's alleged alcohol abuse?

[253] The answer is simply that nothing has changed. In fact, now that the defendant does not know what is going on in the personal life of the plaintiff he should actually be even more concerned because he cannot control the situation or take over to look after C when the plaintiff is incapable in doing so.

[254] The reason is simple. The defendant was not telling the truth. I tend to agree with Mr Mouton when he submits that when the defendant realised that relocation is becoming a reality for the plaintiff he had to do something to prevent it and what better way than to make the plaintiff out as a drunk and a mother who neglects her little one.

[255] Having also carefully considered the defendants evidence regarding the plaintiff's drinking habit I got the impression of the over exaggerating of the one or two incidence which he identified to the court. A good example is when the defendant testified about an occasion when the plaintiff supposedly had too much to drink and passed out in the chair in front of the child. Little C, who must have been two years old, apparently hid under the chair crying. No two year old has this type of reaction if his or her parent falls asleep in a chair.

[256] There appears to be no truth in either the allegation of alcoholism or the allegation of reckless and irresponsible behaviour in respect of C. There is thus no merit in the defendant's so-called concern for the well-being of the minor child.

[257] The next issue that needs to be specifically addressed is what value for purpose of this hearing should the court attach to the defendant's sexual exploits and his number of transient relationships.

[258] Ms van Rooyen was of the opinion that the defendant's past indiscretions do not impact on him as a competent father. Mr Dowdall on the other hand was of the opinion that the defendant is lacking judgment and his past actions may be a prediction of future behaviour.

[259] I do agree with Ms van Rooyen that the defendant's past indiscretions does not impact on him being a good father and it does not change the fact that he deeply cares for his child and would never intentionally to harm her. However, these illicit relationships that the defendant engaged in show a serious lack of judgment.

[260] In both instance the defendant made himself guilty of a breach of trust. The defendant made advances towards his wife's best friend and must have realised what the consequences would be if the relationship escalated and his wife discovered the truth. Yet against his better judgment (or lack thereof) he propositioned her.

[261] In respect of CS, he engaged in an intimate relationship with a friend's wife from a very close-knit biker's group. The defendant testified that he knew the rule of the club prohibited having an affair with a fellow biker's wife yet he proceeded with the relationship.

[262] The behaviour by the defendant created substantial trust issues between the plaintiff and defendant. Although the defendant maintains that this behaviour belongs to the past it cannot be disregarded as the said behaviour is evidence of defendant's proclivity to deception.

[263] If one projects ahead and the defendant finds himself in a tempting situation again, would he exercise the necessary restraint or would his questionable judgment

escalate to further problems in future? If it does and the minor child is in the care of the defendant it would in all likelihood have a negative impact on her.

Views of the child

[264] When this enquiry started C was a very tender three year old. She is now six years going on seven years old. I am of the view that she is at this stage still too young to be able to voice her preferences and it would be gravely unfair to expect of her to choose between two parents that she loves dearly.

Conclusion

[265] I am satisfied having considered the evidence of the experts that C has a solid and secure bond of attachment with both her parents but that her primary bond of attachment is with her mother. Even though she stayed with the defendant during the times when plaintiff travelled to Stellenbosch, C always knew that she would return home to her mother and that is where her emotional base is located.

[266] Placing C in the care of the plaintiff would place her in a settled home with two cooperating and affectionate parental figures and C will be able to grow up in a home where she will learn about fundamental concepts in respect of relationships contrary to what it would be if she is placed in the care of the defendant.

[267] I am of the view that plaintiff is more emotionally mature one between the two parents, for the reasons set out above, and has more insight into the developmental and academic needs of the minor child. I do not believe that C's best interest will be served in staying with the defendant.

[268] I do understand that there will always be positives and negatives associated with relocating, and in the case with only one of the parents, however I am satisfied

that the potential damage to C will be greater if she remains in Swakopmund with the defendant.

[269] I am also of the view that refusing relocation with the plaintiff, which would result in the plaintiff having to stay in Swakopmund would not be in the best interest of C either.

[270] I can merely echo what the learned judges said in the *Jackson*[51] matter and in *F v F*[52] that refusing a custodian parent to relocate with the minor child will impact on the custodian parent's emotional and psychological well-being which will in turn impact on the well-being of the child. This need not be projected on the minor child because as a matter logic a bitter and unhappy parent cannot provide a child with a happy and secure environment.

[271] The defendant felt that he should not be forced to pack up his life and move to Stellenbosch in order to satisfy the plaintiff, yet he expects the plaintiff to remain in Swakopmund so that he can exercise his access to C. In my opinion it will have disastrous consequences for the plaintiff and defendant's already shaky relationship and this will inevitably impact on C if the relationship between her parents deteriorates any further.

[272] I am satisfied that custody and control must be awarded to the plaintiff subject to the defendant's reasonable rights to access and that the plaintiff should be granted leave to relocate to Stellenbosch, Republic of South Africa.

Possible trauma for the minor child upon relocation

[51] *Jackson* supra at footnote 14.
[52] See footnote 18 above.

[273] I realise that the relocation is not going to be easy for the defendant as the non-custodian parent and it will take time for C to adapt to the changes that will be imminent in her life, but I also believe that academically, now is the best time for her to make the move. Ideally this should have been done before she started grade 1, however it is still early in the year and I trust that she will not fall behind.

[274] There is an obligation on the plaintiff to preserve the bond between father and daughter at all costs and leave what happened in the past exactly where it belongs, in the past, for the sake of her daughter. I also belief that the bond between C and her father is strong enough to withstand the move.

[275] I am well aware that virtual contact can never replace the hugs and kisses of a parent but we are living in a global village and C will be able to have virtual contact with her father every day. The difference will now be that she will not be able to visit him every second weekend.

[276] I am further of the view that proper access arrangements can go a long way to mitigate the possible pain or anxiety that the minor child (and the non-custodian parent) might suffer. I was made to understand that the plaintiff tendered to bring the minor child at her cost to come and visit the defendant in Swakopmund as well. The access order that follows hereunder is also aimed at providing C with extensive and reasonable access to both her parents.

Access order

[277] The parties must comply with the following directions regarding access:

1. Reasonable access in Stellenbosch, be as follows:
When the Defendant intends to visit the minor child in Stellenbosch, he may do so on two (2) weeks prior arrangement with the Plaintiff, and have access as follows:

1.1 During school term:

1.1.1 The defendant is granted uninterrupted and overnight access to the minor child for the entire duration of his stay, which period is to be extended to

a maximum of 14 (fourteen) days at a time and limited to one occasion every school term.

1.1.2 The Defendant, for the duration of this visit, to be responsible for the minor child's school-, extra-mural, and reasonable social obligations and to ensure that she fully participates and keeps up to date with all school-related activities and obligations, such as homework etc.

1.1.3 The Defendant must inform the Plaintiff of the particulars of the address where the minor child be staying for the duration of this period.

1.2 During school holidays:

1.2.1 The defendant will have uninterrupted and overnight access to the minor child for the duration of the holiday available to him as set out in para 3.

1.2.2 In the event that the defendant wishes to take the minor child to a place outside Stellenbosch during the holiday period the defendant must furnish the plaintiff with the full details of the place where he and the minor child would stay.

1.2.3 The defendant will receive the minor child at 09h00 on the first day of the holiday period and will deposit the child back at home no later than 18h00 on the last day of the holiday period.

1.3 In the event that the Defendant relocates to Stellenbosch:

1.3.1 In the event of the Defendant relocating to Stellenbosch, access to revert to the current arrangement as was regulated by the interim access order in place before the final judgment handed down on 12 April 2021.

2. Reasonable access in Swakopmund outside of school holidays (South African), be as follows:

2.1 Visits outside of school holidays (South African)

1.2.1 When the minor child is in Swakopmund with the Plaintiff, the Defendant on prior arrangement with the Plaintiff, will have free access to the minor child. The Plaintiff will inform the Defendant on two weeks prior notice in the event of the minor child and Plaintiff visiting Swakopmund outside of school holidays (South African).

2.2 Visits during school holidays:

2.2.1 The defendant will have uninterrupted and overnight access to the minor child for the duration of the holiday available to him as set out in para 3.

2.2.2 In the event that the defendant wishes to take the minor child to a place outside Swakopmund during the holiday period the defendant must furnish the plaintiff with the full details of the place where he and the minor child would stay.

2.2.3 The defendant will receive the minor child at 09h00 on the first day of the holiday period and will deposit the child back to the plaintiff where she may be in Swakopmund no later than 18h00 on the last day of the holiday period.

2.3 Telephone / video conferencing

2.3 The Defendant or the Plaintiff depending in whose care the minor child is at the time will have liberal telephonic / video conferencing access to the minor child at all reasonable times, preferable between 17h00 and 19h00 daily.

3. School holidays and special days

Regarding school holidays (South African), the Defendant's rights of reasonable access, be as follows:

3.1 Every alternative short holiday with the effect that such access will fall over the Easter period every alternative year.

3.2 Half of every long holiday with the effect that such access will fall over the Christmas period every alternative year.

3.3 Each party to have access to the minor child on special days such as Mother's- and Father's Day, irrespective of it falling within the access period of the other parent.

3.4 Access to be managed to ensure that both parties have equal access to the minor child on her birthday.

4. Virtual access:

4.1 Defendant to have virtual access to the minor child via skype or FaceTime or any other appropriate social-media application.

4.2 Defendant to have daily virtual access to the minor child from 17H00 to 19h00 daily. This shall also be the arrangement when the minor child is with the Defendant unless otherwise agreed between the parties, on prior arrangement made.

4.3 Plaintiff to ensure that the minor child is indeed reachable at these indicated times.

4.4 The minor child has a cell phone by which the defendant will be able to have contact with her. The plaintiff must ensure that the device remains in working condition at all material times.

4.5 The minor child to be allowed free telephonic or virtual access to either of the parents whenever she initiates such contact.

.

5. Travelling of the minor child

Subject to the Defendant continuing to reside in Swakopmund, Namibia:

5.1. the Plaintiff must at her cost, which includes the travel costs of the minor child as tendered by the Plaintiff, accompany the minor child when travelling to and from Swakopmund to visit the Defendant;

5.2 the Plaintiff will accompany the minor child until she reaches the age of 16 (sixteen) years.

5.3 In the event of the Defendant moving from Swakopmund in the future the parties will revisit this point to establish alternative suitable arrangements.

6. Moving from the current residential address by the Plaintiff:

Should the plaintiff move from her current residential address she will be obliged to provide the defendant with the new address where the minor child will be residing within a reasonable time before the move.

7. School and School progress:

7.1 The minor child is enrolled at Eikestad Primary School, Stellenbosch, Republic of South Africa (hereinafter “the school”) and will attend same from the second term onwards, which term starts on 3 May 2021.

7.2 The Plaintiff must ensure that the Defendant’s full and updated details are on record at the school and that the Defendant is included in all school communication in as far as it is reasonably possible and within the control of the Plaintiff.

7.3 The Plaintiff must ensure that the Defendant’s details are on record with regards to extra-mural activities that the minor child attends and that the Defendant is included in all communication in as far as it is reasonably possible and within the control of the Plaintiff.

7.4 The school must be requested to furnish the Defendant with all school reports and the like pertaining to the minor child.

7.5 If there is a need to move the minor child to another school the defendant must be duly informed and reasons must be advanced by the plaintiff for the need to do so.

8. Medical Aid:

8.1 The minor child must be retained on a medical aid fund/scheme in the Republic of South Africa together with the Plaintiff and her spouse.

8.2 The Defendant must pay to the Plaintiff such portion of the premium in respect of the minor child in addition to the maintenance payable on the same terms.

8.3 The parties to remain equally liable for all costs not covered by the medical aid fund/scheme in respect of the minor child.

8.4 Plaintiff shall advise the defendant of any surgery or any other invasive procedures, treatments and/or prognoses without delay.

9. Period before relocation to Stellenbosch

9.1 The Plaintiff intends to relocate to Stellenbosch, Republic of South Africa on 28 April 2021.

9.2 The Defendant will have access to the minor child for the entire April holiday period running up to 27 April 2021 at 19h00.

10. General

10.1 Upon arrival in Stellenbosch and until such time that the Plaintiff secured a South African telephone number for the minor child the plaintiff must make the necessary arrangement to enable the defendant to have his daily virtual contact with the minor child.

10.2 The plaintiff must furnish the defendant with the minor child's South African telephone number no later than 3 May 2021.

Order

Judgment is granted in favour of the plaintiff in the following terms:

1. The defendant's counterclaim is dismissed.

2. That custody and control of the minor child born from the marriage is awarded to the Plaintiff subject to the Defendant's reasonable rights to access, which portion is attached hereto and marked **Annexure A**.

3. That the plaintiff is granted leave to re-locate to Stellenbosch, Republic of South Africa, with the minor child so born from the marriage subject to the defendant's rights of reasonable access, which portion is attached hereto and marked **Annexure A**.

4. The defendant is ordered to sign all the necessary papers for a passport to be obtained on behalf of the minor child and the necessary consent to leave the Republic of Namibia in the care of the plaintiff.

5. The defendant to pay maintenance for the minor child, in the amount of N$5 000-00 (Five Thousand Namibia Dollars) per month, free of bank charges and without deductions payable on/or before the 7th of each consecutive month. The maintenance will be subject to an annual escalation of 10% on the 1st of May of each consecutive year. The first payment is to commence on 1 May 2021.

6. That costs is awarded to the plaintiff, such costs to include the costs consequent upon the employment of one instructing and one instructed counsel.

7. Each party to pay the disbursements, expenses, qualifying fees and attendance fees of their respective expert witnesses.

_____

J S Prinsloo

APPEARANCE

Plaintiff:	Adv C Mouton On the instructions of Theunissen, Louw and Partners Windhoek
Defendant:	A Delport Delport Legal Practitioners Windhoek