

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CJS

Appellant

and

CS (Born S)

Respondent

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: 1 October 2021

Delivered: 15 October 2021

Summary: The parties in this appeal were married on 19 March 2011 and divorced during 2017. A minor child (C) was born from the marriage. During the duration of the marriage, problems started to surface which put a strain on the marriage (ie the husband/father's (F) erratic income and financial difficulties and his adulterous proclivities). Subsequent to the wife/mother (M) and F's separation, M met up with PH and a relationship developed, causing M to frequently travel to Stellenbosch to visit PH. During October 2016. M informed F that she wanted a divorce and the custody of C. M instituted divorce and custody proceedings. In the process of the divorce proceedings, the parties reached a settlement agreement. In the settlement agreement, M was awarded custody of C and F was given generous access to the child. The settlement agreement further stipulated that C is not allowed to relocate with M to a location outside Namibia without the consent of F which consent shall not be unreasonably withheld. On 17 April 2017, M informed F that her relationship with

PH had become serious and that she intended to move to Stellenbosch with C. On 19 April 2017, M obtained a restitution order with a return date of 29 June 2017. On the return date, F filed an affidavit in the divorce proceedings indicating that he agrees to divorce but disputes the custody order sought. According to F, it would be in the best interests of C that he be awarded custody so as to prevent C from moving to Stellenbosch with her mother. The affidavit made serious allegations of alcohol abuse against M leading to the custody issue being assessed by three psychologists.

In its thorough judgment of 12 April 2021, the court *a quo* found in favour of M who had by then married PH and started to relocate from Swakopmund to Stellenbosch where her new husband's home and business are situated. Dissatisfied with the judgment and order of the High Court, F appealed to this court.

This court must determine what is in the best interests of C and whether the court *a quo* erred in granting custody of C to M with reasonable access to F (essentially allowing M to relocate with C to Stellenbosch).

Held that, the overwhelming number of decisions on relocation indicate that if the relocation is reasonable and in good faith, the best interests of the child given the fact that the parents will live in different countries, must determine in whose custody the child must be placed.

Held that, taking account of the time spent with both parents over C's lifespan and their respective roles since infancy, the probabilities indicate that C regards M as her primary attachment figure. This finding is bolstered by the fact that two of the three experts who investigated the matter came to the same conclusion based on their evaluation and assessment whereas the third expert cannot come to a definite conclusion in this regard.

Held that, when regard is had to the interests of C, the court *a quo* was correct to find that it will be in her best interests to be placed in the custody of M and to relocate with

her mother to Stellenbosch essentially for the reasons spelled out by the psychologist, Mr Dowdall.

This court finds that the court *a quo* did not err in its finding in this regard.

The appeal is dismissed with costs including the costs of one instructing and one instructed legal practitioner.

APPEAL JUDGMENT

FRANK AJA (MAINGA JA and HOFF JA concurring):

Introduction

[1] The parties were married to each other and out of this marriage one daughter was born on 1 September 2014. The marriage disintegrated and the parties divorced during 2017. In the process of the divorce proceedings a dispute arose as to which parent should be awarded custody and control of the minor child who was then about three and half years old. The issue became more complicated than the normal custody dispute as the mother intended to relocate to Stellenbosch, South Africa and to take the child with her.

[2] The enquiry into the custody of the minor child and her relocation to Stellenbosch was conducted in the High Court as an issue arising in the divorce proceedings intermittently from 4 February 2019 up to 19 January 2021. On 12 April 2021 the High Court found in favour of the mother who had by then re-married and had started to relocate to Stellenbosch where her new husband's home and business

are situated. Because of the interim custody arrangement in place pending the resolution of the custody dispute the mother frequently travels from Stellenbosch to Swakopmund and vice versa. Swakopmund is the place where the parties resided immediately prior to their divorce and where the father of the child currently still resides.

[3] For the sake of convenience, seeing that the initials of both the parties and that of the child is CS I shall in this judgment refer to the mother as M, father as F and the minor child as C.

[4] The High Court judgment¹ is a very thorough and comprehensive one that sets out the relevant facts, circumstances and the contentions on behalf of the parties fully and it is thus not necessary in this judgment to set out a full background to the disputes between the parties. I shall endeavour to set out the background sufficiently for the purposes of the aspects raised in this appeal but insofar as the full judgment may be required the High Court's judgment should be read with this judgment.

[5] F being dissatisfied with the judgment of the High Court noted an appeal to this court and it is this appeal that serves before this court.

Background

[6] F and M married in Swakopmund on 19 March 2011. At the time of the marriage M, who is a Namibian citizen, was self-employed as a personal trainer

¹ CS v CS (HC-MD-CIV-ACT-MAT-2017/00179) [2021] NAHCMD 170 (12 April 2021).

operating from her own business. F, a South African citizen, worked as a jewellery designer and goldsmith at a business in Swakopmund.

[7] Shortly after the marriage F resigned from his employment and started out on his own with a substantial portion of his start-up capital provided by M. The business venture of F did not turn out to be successful and his erratic income and financial difficulty strained the relationship between the parties.

[8] Mid 2012 F struck up a friendship with a close friend of M. Whereas F clearly desired that this friendship move to the physical level, the friend of M was not amenable to this and reported F's inappropriate approaches to M. This caused F not to persist with his approaches to this friend of M.

[9] During December 2012, F commenced with an adulterous relationship with G, the wife of an acquaintance of his who was (together with his wife) a member of the same motor cycle club as F. The adulterous relationship commenced when the wife occasionally came to manage the club which was situated next door to the business of F. This relationship between F and the wife of his co-member continued up to February 2014. This relationship was not disclosed by F to M and only came to the knowledge of M subsequent to the separation between the parties.

[10] During the time that F was involved in the abovementioned relationship M was desperately trying to fall pregnant and had several miscarriages. Things however changed for the better for M and she became pregnant and gave birth to C.

[11] During 2015, F and M decided to relocate to Stellenbosch in South Africa, and did so during September 2015. This move was prompted in the main by financial considerations as F's income from his business was very erratic and the resulting financial difficulties put a strain on the marriage.

[12] M took up employment with Mr PH, a property developer in Stellenbosch whom she knew as he had a holiday house in Swakopmund adjacent to that of M and F. F worked at a factory at Paarl which involved long hours and also did some freelance work as a jewellery designer. When F's employment at the factory came to an end in December 2015 the couple decided to return to Swakopmund seemingly in a bid to save their marriage which began to take a strain. It should be mentioned that F's mother went to stay with the couple in Stellenbosch to assist with the caring of C.

[13] Back in Swakopmund M resumed her business activities and F set up a workshop at their house from where he worked as an independent goldsmith. M's mother joined them in Swakopmund to assist with the care of C.

[14] The attempt to save the couple's marriage did not succeed and during September 2016 M requested F to move out of the matrimonial bedroom. During October 2016 M learned of F's affair with G. Also during October 2016 M informed F that she wanted a divorce from him and the custody of C. F was not amenable to allow M sole custody of C and informed her that he would see his own legal

practitioner in this regard. After M confronted F with yet another affair she heard about and which F denied, F moved out of the common home.

[15] On 15 November 2016 M confronted F about his affair with G. This ended up in an altercation between them which led to M locking F out from her house causing F to bang on the glass doors of the house to gain access to C. M refused to give F access for two days but thereafter the situation returned to normal and F was granted access to C.

[16] In the months subsequent to the separation of M and F the former met up with PH and a relationship developed between the two of them causing M to frequently travel to Stellenbosch to visit PH. It should be mentioned that PH is a widower who lost his wife 20 years into that marriage.

[17] M instituted divorce proceedings in January 2017. Although it was initially defended by F the parties reached a settlement on 31 March 2017 and F withdrew his defence on 4 April 2017.

[18] In terms of the settlement agreement M was awarded the custody and control of C and F was given generous access to the child. According to F, he initially wanted joint custody but was advised by his legal practitioner that the Namibian courts were reluctant to grant such order and it was unlikely to grant it in his case and that he should accept that M would get custody. F states that as the generous access to C granted to him virtually amounted to joint custody he agreed to the terms recorded in

the settlement. The settlement agreement stipulates that C is not allowed to relocate with M to a location outside Namibia without the consent of F which shall not be unreasonably withheld.

[19] On 17 April 2017, M informed F that her relationship with PH had become serious and that she intended to move to Stellenbosch with C. She suggested to F that he should also consider moving to Stellenbosch. F indicated that he would consider doing this.

[20] With the settlement agreement in place M obtained a restitution order on 19 April 2017 with a return date of 29 June 2017. In other words, F was called upon to show cause by 29 June 2017 why the divorce inclusive of the settlement agreement should not be made a final order on 29 June 2017.

[21] However on 29 June 2017 F filed an affidavit in the divorce proceedings styled an 'Affidavit to show cause' in which he agreed to the divorce but indicated that he would dispute the custody order that was sought. According to F it would be in the best interests of C that he be awarded custody and control and to prevent her from moving to Stellenbosch with her mother.

[22] F's change of heart relating to the custody is based on the following averments in this 'Affidavit to show cause':

- '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.
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.'

[23] Not surprisingly the court *a quo*, faced with the extremely serious allegations made on affidavit by F, had to enquire into the aspect of custody of C. This led to the position being assessed by three psychologists namely Mrs Bailey, Mrs van Rooyen and Mr Dowdall and a prolonged and intermittent trial as indicated above. In the meantime, an interim custody arrangement was put in place with the child remaining in Swakopmund in the custody of M with liberal access to F. M was in fact prevented from relocating to Stellenbosch with the child and this arrangement is, due to the appeal, still in place.

Change of tack by appellant at the enquiry into the custody of the child

[24] Despite the allegations of alcohol abuse being the sole basis of the attack on the interim custody order in the affidavit to show cause and hence also the sole basis for an enquiry in this regard this issue turned out to be a bogus one.

[25] The three psychologists in their joint report agreed as follows with regard to this issue:

'The experts agreed that on the evidence available to them they could not say that the plaintiff (M) is an alcoholic and were in agreement that the allegations on alcoholism should carry no weight in the assessment.'

[26] F in his evidence in essence discounted any reliance on this aspect and in fact conceded that as far as his mother-in-law was concerned he himself left C in her care on occasion when he had to travel for work and M was in Stellenbosch.

[27] As the court *a quo* remarked in this regard:

'It is therefore difficult to understand that after all the allegations in respect of plaintiff's drinking habits the defendant is no longer concerned about it. He is no longer worried about plaintiff's drinking habits and now regards the maternal grandmother, whom he alleged to also have alcohol problem and who would become drop-down drunk, a major part of his support system, should custody be awarded to him.'

[28] Mrs van Rooyen, in whose opinion it will be in the best interests of C to be placed in the custody of F, makes light of this by suggesting that F has a real *bona fide* concern in this regard. This approach flies in the face, not only of what is stated in

the joint experts report to which she was a party but also of the evidence of F. As the court *a quo* put it 'the defendant was not telling the truth'.

[29] It seems clear, and alluded by the court *a quo* and counsel for M, that F invented this problem as a ruse to have the custody question re-opened. He clearly could not allege that M was not *bona fide* with her intention to move to Stellenbosch and he could not object to Stellenbosch as a town nor to the circumstances M would find herself in that town. Whereas his previous legal practitioner may not have advised him correctly (on his version) as to joint custody, he must have learnt from her that the only way he would be able to obtain custody was to besmirch M which he did and for good measure did the same with everyone in whose care C could end up through M, ie her mother and M's sisters.

[30] Whereas the behaviour of F in this regard may indeed indicate that he was desperate not to lose his close contact with C it is also indicative of someone who will fabricate facts to justify something he really desires. This in my view is evidence of a serious character flaw that simply cannot be dismissed in the manner Mrs van Rooyen attempted to do. I return to this aspect later in this judgment.

[31] On behalf of F it was suggested that M misled him when the settlement agreement was entered into as she must have, by then, already decided to move to Stellenbosch but did not disclose this. It was suggested that this was a strategy on her side to first obtain custody and then, as custodian parent make a decision to move as this would then be in her rights as such. The sting is however taken out of

this attack on M by reason of the fact that the settlement agreement expressly provides for a relocation outside Namibia with the consent of F. Thus, even if M contemplated moving to Stellenbosch prior to the settlement agreement she knew she would have to obtain permission from F when she entered into the settlement agreement.

The enquiry

[32] Because of the baseless nature of the claim raised in respect of the alcohol usage by M and her mother the enquiry into the custody of C in essence turned into the best interests of the child when it came to relocation of M to Stellenbosch. Would it be in the best interests of C to stay put in Swakopmund or would it be in her best interests to relocate with M to Stellenbosch. If it is in the best interests for C to stay put in Swakopmund then there seems to be consensus among the experts, assuming that M will then also decide to stay put irrespective of her marriage to PH, that M and F will be given joint custody of C. Should M decide to move to Stellenbosch to live with PH the experts seem to acknowledge that joint custody would not do and that custody should be granted to either F or M and C must then live with the custodian parent with as much access as possible to the non-custodian parent as is practically feasible.

[33] Before I deal in more detail with the enquiry it is important to note that all the experts reported on a child who was about three and half years old and by the time the enquiry started in February 2019 she was about four and half years old and by the time the judgment of the High Court was delivered on 12 April 2021 she was six and

half years old and at the time of this hearing she would already have turned seven. It goes without saying that there is a massive difference between a child aged three and half and one aged seven. Some of the aspects of the assessment done when the child was three and half years old will thus have to be qualified and adapted. Fortunately the experts dealt with the change in child development in their evidence and one is thus capable, on the existing evidence, to deal with this factor.

[34] Apart from the fact that the child is now nearly double her age since the first evaluation from the experts, the situation of M and F has also changed. M has since married PH who has two sons of university going age who will be stepbrothers to C. F's earning capacity has again reversed to a position of him being self-employed working on a freelance basis. He also struck a close friendship with a woman but says it has not moved to an intimate level as he is only concerned with the wellbeing of C.

[35] Apart from the agreement between the experts relating to the allegations of alcohol abuse by M which I dealt with above they also agreed that 'both parents were capable of providing basic care to the minor child and that there were no indications that she suffered neglect in either household'. The experts in their joint report narrowed down the differences to two aspects, namely, who the primary attachment figure was in the life of C and how effective contact could be maintained between C and her parents. As far as the primary attachment figure was concerned, Mrs Bailey and Mr Dowdall were of the view that based on the caregiving history and clinical observations that this was probably M whereas Mrs van Rooyen's view was that there

was equivalent attachment with both parents. Mrs van Rooyen however watered this down a bit in evidence to suggest it was not possible to determine the issue on the limited evidence available to the experts and seeing the advance in age of C between the time the experts investigated the issue up to the time the enquiry was held that C should be re-assessed to determine who the primary attachment figure was. As far as contact with the parents was concerned, the issue was how to maintain the bonds between the parents and the child. Here Mrs Bailey and Mr Dowdall were of the view that the access management could be structured so as to maintain the relationship, whereas Mrs van Rooyen was of the view that 'block access' over school holidays where the parents lived in Stellenbosch and Swakopmund respectively would not be sufficient and that the parents should stay in the same vicinity.

[36] The consequence of the difference between the experts were that Mrs Bailey and Mr Dowdall are of the view that the best interests of C was that she be placed in the custody of M and be allowed to relocate with her subject to generous access to F. Mrs van Rooyen's view is that it is in the best interests of C to remain in Swakopmund and if M decides to remain in this town, that joint custody be granted but if she decides to move to Stellenbosch permanently to stay with her husband that the custody of C be granted to F with generous access to M.

Relocation

[37] Relocation after divorce is commonplace. Where the custodian parent relocates within Namibia there is normally no issue and the children will follow the custodian parent. Nor is the other parent's consent for such relocation normally

required. This is simply an incidence of the custodian parent's custody. Where however the relocation involves a move to foreign soil the position is different. The consent of the non-custodian parent is required and failing that the court must decide the issue.

[38] As pointed out by the court *a quo*, although it is commonly accepted that it is in the child's best interests if his or her parents live in close proximity to each other this does not mean courts will in general, force parents to do this or risk losing contact with their children. The courts cannot ignore the realities of modern life where divorce persons move on to further their careers and form new liaisons, remarry and increasingly relocate across borders in pursuit of happiness and a more fulfilling life. Courts are, after all, not guardians of adults and adults are not prisoners of the court. The question in the overwhelming number of international relocation cases, where the relocation is reasonable and in good faith, boils down to what would be in the best interests of the child given the fact that the parents live in different countries.

[39] The court *a quo* adopted the principles spelled out in case law in South Africa with regard to international relocation and neither party has taken issue with this approach in this appeal. In my view, the South African cases do indeed summarise an approach to this issue that we should adopt in this country. I refer to these authorities in the course of this judgment.

[40] Firstly, a neutral approach is taken to the issue of relocation. This means that there is no presumption either in favour of or against relocation and each case is

considered afresh on its own facts. This means there is no absolute right to either relocate or to block a relocation. The proposed move is to be reviewed by the court from the perspective of the child's welfare and interests.

[41] Secondly, the principles applicable to such enquiry by the court is set out in *Jackson v Jackson*² 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.'

[42] Thirdly, guidance can also be had from the approach in *F v F*³ where the above principles stated in the *Jackson* case were further elaborated on as follows:

² 2002 (2) SA 303 (SCA) at 318E-I. Also see *NS v RAH* unreported judgment case no. I 1823/2008 delivered on 8 April 2011 (with reasons released on 21 April 2011) where the principles in *Jackson v Jackson* were adopted in our jurisdiction.

³ 2006 (3) SA 42 (SCA) paras 10-13.

[10] In deciding whether or not relocation will be in the child's best interests the Court must carefully evaluate, weigh and balance a myriad of competing factors, including the child's wishes in appropriate cases. It is an unfortunate reality of marital breakdown that the former spouses must go their separate ways and reconstitute their lives in a manner that each chooses alone. Maintaining cordial relations, remaining in the same geographical area and raising their children together whilst rebuilding their lives will, in many cases, not be possible. Our Courts have always recognised and will not lightly interfere with the right of a parent who has properly been awarded custody to choose in a reasonable manner how to order his or her life. Thus, for example, in *Bailey v Bailey*, the Court, in dealing with an application by a custodian parent for leave to take her children with her to England on a permanent basis, quoted – with approval – the following extract from the judgment of Miller J in *Du Preez v Du Preez*:

“[T]his is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside; indeed, the Court takes upon itself a grave responsibility if it decides to override the custodian parent's decision as to what is best in the interests of child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian parent's decision and the emotions or impulses which have contributed to it.”

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

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

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

[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 – 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. 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. As was pointed out by Gaudron J in a minority judgment in *U v U*, the leading Australian case on relocation:

"[I]t 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 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”. 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.’

[43] Fourthly, in determining the best interests of the child, regard must be had to the requirements stipulated in s 3 of the Child Care and Protection Act⁴ where relevant. I should point out that the matters mentioned in this Act in essence tabulates factors that have been legally recognised by the courts in any event when it comes to the consideration of what is in the best interests of children. This is not to say it is not a useful exercise to refer to the Act to ensure that one acts in accordance with its provisions as some of the requirements may get lost in the litigation dust where the parties to the dispute focus on other factors.

[44] Lastly, these cases are hardly open and shut cases, it involves a balancing up of factors and in many cases amounts to an attempt to see what is best for the child in a modern world where due to modern communication and travel technology people

⁴ Act 3 of 2015.

move on an ever larger scale across borders to further their livelihoods. With this background, I can only affirm the comments of Murphy J in *Cunningham v Pretorius* as to the role of the court in such enquiries.⁵

'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 interests of the child.'

[45] As adumbrated in the discussion relating to F's allegations of alcohol abuse, this was a last resort attempt to have the custody issue reopened and the blemishing of the character of M was necessitated by the fact that F could not raise any other issue against M such as her intended relocation in the circumstances was *mala fide* or unreasonable.

[46] I agree with the court *a quo* that there is no basis to suggest otherwise. The court *a quo* summed it up as follows:

'[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.'

Primary attachment and contact with parents

⁵ 31187/08 [2008] ZAGPHC 258 (21 August 2008) para 9.

[47] Mrs van Rooyen was of the view that M's conduct was such to suggest that she would resort to restrictive gatekeeping if she could relocate to Stellenbosch with C. Restrictive gatekeeping in this context refers to conduct by the custodian parent that avoids and frustrates contact with a child by the non-custodian parent.

[48] Some instances of this were averred but it turned out that restrictive gatekeeping was not the right inference to draw from those instances. These instances in any event were very rare in the context of the access management between the parties and that M would resort to such practices was correctly dismissed by the court *a quo*. The alleged incidents relied upon were two isolated incidences and the circumstances in which they arose is simply no indication of a hostile gatekeeping pattern. This objection to granting custody to M was thus overstated by Mrs van Rooyen.

[49] The court *a quo* pointed out that primary attachment was not the only criteria in deciding custody matters and left it at that. The court *a quo* thus clearly did not deem it necessary for this aspect to be investigated further as Mrs van Rooyen wished and felt it had enough information to determine the dispute.

[50] In my view, the position is even clearer currently. Mrs van Rooyen in her evidence has the following to say in this regard:

' . . . at the age of three, attachment will be one of the important aspects of a custody assessment. But at the age of five and six that would not be the only thing that you would look at . . . because attachment become less and less important as the child

grows older . . . So as the child grows older it is important that one should also look at other aspects of parenting and of the interaction of the child and the parent.'

[51] Once again, the current position where the child is seven years old, has meant the importance of attachment or primary attachment in the early years were catered for by virtue of the interim custody arrangement between the parties. Accordingly, the resolution of this issue has become less important and secondary to other considerations. It follows that the primary attachment issue is not as important a factor, as it was, even on the stance of Mrs van Rooyen.

[52] The same situation applies to the 'block access' with the non-custodial parent. Mrs van Rooyen in her evidence states her opposition to this type of access as follows:

' . . . , I do not support the recommendation of regular block of contacts as a substitute for regular shorter access to both parents. While it is true that a child develops the primary parent child bonds in the period between birth to three or four years, these bonds remain fragile until about five to seven years due to intellectual and psychological capacity factors.'

[53] It thus follows that the objection to 'block contacts', with the passing of time, has also diminished and became less important and secondary to other considerations in deciding the issue.

[54] Because of what is stated above I am also not amenable to the submission on behalf of F that the court directs an assessment as to whom of the two parents can be regarded as the primary attachment figure for C.

[55] It must not be inferred of what is stated above that I accept the view of Mrs van Rooyen that it is not possible to determine the attachment figure of C on the probabilities. I am just pointing out that to determine this without any doubt will not be crucial for the determination of the issue as is suggested by counsel for F. Taking account of the time spent with both parents over her lifespan and their respective roles since infancy, the probabilities indicate that C regards M as her primary attachment figure. This finding is bolstered by the fact that two of the three experts who have investigated the matter came to the same conclusion based on their evaluation and assessment whereas the third expert cannot come to a definite conclusion in this regard.

Best interests of C

[56] The gist of the differences between Mrs van Rooyen and the other experts is the manner in which the respective parents' psychologist make-up is perceived. Thus Mr Dowdall puts the position as follows: The work history of F has been erratic at times and he would simply leave jobs where he has grievances about the management. As mentioned above, it is his work situation and his attitude towards work which caused the family to move to Stellenbosch and back. According to Mr Dowdall, his track record is such that he is less likely to give C an ongoing stable or child-friendly work situation. F, also according to Mr Dowdall, has some difficulties in

making good judgment calls regarding female partners and has shown that he makes opportunistic or ill-judged choices in this regard. The two relationships F entered into while married to M and discussed above 'indicates a gap in comprehension or empathy regarding the consequences of his actions on a level of need and compulsiveness that overrides better judgment'. Both of these inappropriate relationships 'involved active deception' according to Mr Dowdall. As a result it is concluded that it 'is unlikely that the child will have the same kind of comfortable and settled family home situation with the father she would have with her mother'.

[57] Mr Dowdall expresses the position of C translocating with M as follows:

'The positives of the relocation option are in my opinion that C will stay with her primary attachment figure, as I believe her mother to be, in a home setting in which there are two co-operating and affectionate parent figures. This is valuable for the child's own fundamental conception of how relationships work. It is far healthier for her than ongoing exposure to resentment and conflict, or to a single relatively reclusive parent with transient relationships. When children grow up, they often default to the model of relationships that they have been exposed to. Equally importantly, the sense of a coherent family life will be underpinned by a well organised home situation, with good facilities in a pleasant and comfortable house, a mother who is available early mornings, afternoons and evenings, and a housekeeper who lives on the property and is available as backup when needed. (M) has a reputation for being well organised, and in all probability, everything will work smoothly and predictably. From everything that I have seen, (C) relates comfortably and amiably with (PH) and with his son . . . Then over and above this, the reality is that the social, cultural and educational resources of Stellenbosch/Cape Town are vastly more extensive than those of Swakopmund, pleasant though that little town is.'

[58] Mrs van Rooyen as mentioned above, is of the view that the block access granted to F if C relocates to Stellenbosch is not sufficient to maintain her contact with F. I have dealt with this aspect above and with the advancing age of C and am satisfied that this issue is not an insurmountable problem as posited by Mrs van Rooyen. Mrs van Rooyen is further of the view that the picture painted with regard to M's current position in respect of her relationship in her new marriage is simply an assumption not based on facts as the marriage is still in its infancy. As Mr Dowdall points out past behaviour indicates a proclivity to act in a certain manner and is thus a guide to predict future behaviour. Deep-seated issues tend to re-assert themselves in certain situations. Leopards do not change their spots as the idiom states. M's new husband was happily married for 20 years prior to his wife passing away. He thus did the 'until death do us part' bit. M desperately tried to save her marriage to F and on two occasions moved with the family to basically accommodate F to see whether he would be able to become a partner in providing financial security to the family. This was to no avail. At least this issue will not arise in the new marriage as her new husband is clearly a man of means. What is known is that both M and her husband are persons who are serious when it comes to marriage and will do their utmost to make it work.

[59] According to Mrs van Rooyen, it is not fair to judge F on his history as he has conceded his two affairs were wrong, regretted it and is now focused only on C and despite the previous acts F is actually someone with good judgment. I am afraid Mrs van Rooyen is taken in by the fact that F is a kind and loving father who is obviously committed to his daughter and she is being blind to his obvious weaknesses which

one must look at when regard is had to the long-term interests of the child. F's psychological make-up is mentioned by Mr Dowdall in his report. The factual basis of the assessment was never questioned.

16. The school side of F's formative years was not much better, and he summed it up as "*School was crap, a waste of time*". Though he enjoyed literature, he was not a good learner and had a concentration problem and difficulties remembering what he had read, though he could visualise well. He said for many years "*I never had friends at school – people made fun of me – I was tall and thin*" – though later he had friends, but never a best friend. F started off at a disadvantage – he said, "*My father cut my hair badly and I had huge bottle glasses - I was a freak*". He matriculated from Bronkhorstspuit senior school in 1985.
17. After military service he started at Pretoria Techicon (*sic*) Art School, studying graphic design, but found it conservative, failed history of art, and dropped out in 1989. After a stultifying period of working for the Department of Agriculture, he returned to Art School in 1990 to study jewellery design which he loved. Again, he dropped out, preferring to complete an apprenticeship with a goldsmith, where he learned a lot. Later he worked with a master in the field and felt he made great strides, qualifying as a goldsmith in 1993. He moved to Stellenbosch and worked in different settings, starting his own business in Stellenbosch and working in setting diamonds. However when more competitive diamond cutters arrived in Stellenbosch he lost custom (*sic*) and closed shop in 2005. He then thought he would go to Namibia and got a position at African Art Jewellers at the beginning of 2006 as a workshop manager. He said he struggled to gain respect because he was not a master goldsmith trained in Germany, but said he made a place for himself and worked there until they got a new owner that he did not want to work with, in 2011.
18. . . .

19. F said that his first relationship with a woman was a platonic one, because of his shyness, when he was 21 in 1988. She left him after six months, "*which broke my heart*". A while later he became involved for a short while with a much more sophisticated young woman who initiated him into sexual activity. Thereafter he was involved in several relationships of about a year or two, to up to around five years. Some of these women were older or more sophisticated than he was, and he saw some as "*the lady and the tramp*" kind of relationships, or "*broken wing scenarios*" that were convenient to both parties in certain respects, but for one reason or another "*had no real future*", and in some ways 'used' F. All of this, it seemed, made him cautious and mistrustful of relationships and the possibility of rejection one way or another.'

[60] To the above pattern must be added the two relationships struck up by F during his marriage with M. This indicates a proclivity to a certain behaviour which manifest itself in the context where short-term gratification trumps long term perspectives. The pattern indicates a 'judgment issue' and a 'self-interest' issue which will impact negatively on the development of C and on the way C will view relationships.

[61] In my view, it is clear that F has a propensity to look at issues in the short term and to latch onto situations that will satisfy his immediate urges without considering the long-term implications. He is thus prone to make ill-judged choices from a long-term perspective. To expect him not to venture into new relationships because of C is simply wishful thinking and if the pattern of transient relationships and work insecurity is a continuous one he will not be in a position to offer C the kind of stable stress-free home she will experience with M.

[62] I am thus of the view that when regard is had to the interests of C the court *a quo* was correct to find that it will be in her best interests to be placed in the custody of M and to relocate with her mother to Stellenbosch essentially for the reasons spelled out by Mr Dowdall and quoted in para [57] above. The court *a quo* thus did not err in its finding in this regard.

Conclusion

[63] In the result, the appeal is dismissed with costs including the costs of one instructing and one instructed legal practitioner.

FRANK AJA

MAINGA JA

HOFF JA

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