REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2023/00462

In the matter between:

CJV **APPLICANT**

and

DG (PREVIOUSLY V) **RESPONDENT**

Neutral Citation*:* *CJV v DG (Previously V)* (HC-MD-CIV-MOT-GEN-2023/00462) [2023] NAHCMD 829 (19 December 2023)

CORAM: SIBEYA J
Heard: **16 October 2023**
Delivered: **19 December 2023**

Flynote: Urgent application – Rule 73 – Duty of the court as the upper guardian of minor children – Requirements of *Lis pendens* – Status of the minor in South Africa – Best interest of the minor.

Summary: The parties were married to each other in 2010. During the subsistence of the marriage, the child, D, was born in Namibia. They, however, divorced in Namibia in 2018. In 2019, the respondent relocated to Mbombela (formerly Nelspruit), Mpumalanga Division, South Africa and took D along with her.

The parties entered into a settlement agreement regarding custody and primary residence of D. The primary residence of D was agreed to be that of the respondent. The applicant, presently, seeks an order, on an urgent basis, that the primary residence of D should temporarily be with him. The respondent disagrees.

The respondent raised a point *in limine* that the matter was *lis pendens* before the court in South Africa. The court summoned the services of the Children's Advocate in Namibia as well as a Social Worker to assist the court in reaching its findings.

Held: that the applicant established facts in his founding papers which meet the requirements set out in rule 73(4) in order for the application to be heard on urgency, and it shall be heard as such.

Held: that this application is in sharp contrast to the pending litigation in South Africa in all shape and form and, therefore the point *in limine* of *lis pendens* raised by the respondent is misplaced and falls to be dismissed.

Held that: as the upper guardian of D, this court finds that it will be in the best interests of D that he remains in Namibia where he is a fully fledged citizen and enjoys all the rights and privileges of being a Namibian citizen. The court further finds that it will be amiss of this court to send its minor and a citizen of this country, to another country where he is considered an illegal foreigner, with no authorisation to be or remain in that country. The best interests of D dictate that his residence be temporarily ordered to be with the applicant, pending the determination of his primary residence by a competent court.

ORDER

1. The applicant's application to dispense with the forms, services and time periods is granted and the matter is heard as one of urgency.

2. Clause 2 of the settlement agreement, made an order of court on 10 September 2021, pertaining to the primary residence of the minor child, D, is temporarily suspended pending the determination of the dispute regarding the primary residence of D by a competent court.

3. The primary residence of D should temporarily be with the applicant, pending the determination of the dispute of such primary residence by a competent court.

4. The respondent must pay the costs of suit of the applicant, including costs of one instructing and one instructed legal practitioner.

5. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SIBEYA J:

Introduction

[1] This is a very unfortunate matter where parties who reside in two different countries and are parents to a minor child, are involved in a tug of war over the residence of the minor child. Sadly, whether for ulterior motives or not, the push and pull

or back and forth over the residence of the child destabilises the child's growth and where feasible this should be supressed.

[2] The applicant seeks an order for the child, born in 2015, to temporarily reside with him pending the determination of such child's primary residence by a competent court. The application is opposed.

The parties and representation

[3] The applicant is Mr CJV, a major male resident of Windhoek, Republic of Namibia and the biological father of D (the child).

[4] The respondent is Ms DG (previously V), a major female resident of Lachland Farm, Pilgrims Rest, Mpumalanga Province, Republic of South Africa ('Lachland Farm'), and the biological mother of the child.

[5] Where reference is made to both the applicant and the respondent jointly, they shall be referred to as 'the parties'.

[6] The applicant was initially represented by Mr Kasita and subsequently by Ms Garbers-Kirsten while the respondent is represented by Mr Small.

Relief sought

[7] The applicant seeks the following relief:

'1 That the Respondent be called upon to show cause why:

1.1 The forms and services and time periods prescribed by the Court rules should not be dispensed with, and the matter be heard on urgent basis.

1.2 Clause 2 of the settlement agreement, made an order of Court on 10 September 2021, pertaining to the primary residence of the minor child D.., should not be temporarily

suspended pending the determination of the dispute regarding the primary residence of D…, the minor child, by a competent court having jurisdiction to adjudicate the dispute.

1.3 The primary residence of D…, the minor child, should not temporarily be with the Applicant, pending the determination of the dispute by a competent court having jurisdiction to adjudicate the dispute.

2 Costs of suit, only in the event of opposition.

3 Further and/or alterative relief.'

Background

[8] The parties were married to each other in 2010. During the subsistence of the marriage, the child, D, was born in Namibia. They, however, divorced in Namibia in 2018. In 2019, the respondent relocated to Mbombela (formerly Nelspruit), Mpumalanga Division, South Africa and took D along with her.

[9] The parties entered into a settlement agreement regarding custody and primary residence of D. The primary residence of D was agreed to be that of the respondent. The applicant, presently, seeks an order that the primary residence of D should temporarily be with him. The respondent disagrees.

Urgency

[10] The respondent raised a point *in limine* that the applicant's application lacks urgency and ought to be struck from the roll as a result. The respondent contends that the applicant failed to comply with rule 73 of the Rules of this court in that he failed to set out circumstances that render the matter urgent and failed to provide reasons why he cannot be afforded substantial redress at a hearing in due course. The applicant argued contrariwise.

[11] The applicant avers that on 12 October 2023, he was contacted by a Ms Aipinge, a social worker from gender-based violence unit who informed him that the respondent registered a complaint with her, and she asked him to attend to her office. Upon arrival, he found the respondent present. Ms Aipinge was in the company of a Chief Inspector of police. They informed him to hand over D to the respondent or face arrest, and he responded that he will launch an extremely urgent application to seek an order for D to reside with him, which culminated in these proceedings.

[12] The applicant contends that the respondent seeks the immediate return of D to her, when she suffers from severe depression to the extent that she was admitted to a mental facility, a position which prior to 5 October 2023, he had no knowledge of.

[13] He contends further that the respondent relocated to her parents' home and should the matter not be heard on urgency, he will be in contempt of court and liable to punishment under s 35 of the Children's Act 38 of 2005 for keeping D beyond the permitted period. This, the applicant contends, is on the premises that he is concerned for the safety of D should he return to the respondent and reside with her.

[14] This court has said time without number that it takes its responsibility as the upper guardian of minor children seriously. The averments made by the applicant that the respondent suffers from severe depression to the extent that she was admitted into a mental facility, a status that only came to his knowledge on 5 October 2023, thus raising concerns of the safety of D should he return to reside with the respondent, in my view, renders determination of the residence of D urgent.

[15] In the exercise of my discretion, I find that the applicant established facts in his founding papers which meet the requirements set out in rule 73(4) in order for the application to be heard on urgency, and it shall be heard as such.

Lis pendens

[16] The respondent further raised another point in *limine* of *lis pendens* and she contended that the parties are engaged in pending litigation over a custody dispute involving D in the Mbombela High Court, South Africa. At the centre of the said dispute, is a question as to what is in the best interest of D regarding his primary residence and custody. In this connection, a Child Advocate was appointed and is busy with her investigation is that regard. On this basis, the respondent contends that this application is vexatious and should be dismissed. The applicant disagrees and contends contrariwise.

[17] This court in *Old Mutual Life Assurance Company (Namibia) Limited v Erasmus*[1] cited with approval a passage from *Schuette v Schuette,*[2] *where* Angula DJP discussed the concept of *lis pendens* and the court's approach thereto, and remarked as follows at para [14]:

'The requirements for the plea of *lis pendens* in terms of the law are these: there must be pending litigations; between the same parties or their privies; based on the same cause of action; and in respect of the same subject-matter, but this does not mean the form of relief claimed in both proceedings must be identical.[3] The plea of *lis pendens* is not absolute. This means that even if it is found that the requirements have been met, the court has a discretion to allow an action to continue should that be considered just and equitable in the circumstances, despite the earlier institution of the same action.'

[18] Guided by the above requirements, it is apparent that the pending litigation is between the same parties but in my view the cause of action in the present matter is distinct from the pending litigation. Whereas in the pending litigation the dispute between the parties revolves around the permanent residence and custody of D, in the

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[1] *Old Mutual Life Assurance Company (Namibia) Limited v Erasmus* (HC-MD-CIV-ACT-CON-2020/03792) [2021] NAHCMD 261 (27 May 2021).
[2] *Schuette v Schuette* (HC-MD-CIV-MOT-GEN-2019/00376) [2020] NAHCMD 426 (18 September 2020).
[3] LAWSA Vol 3 para 247; *Baker v The Messenger of Court for the District of Walvis Bay* (A 309/2015 [2015] NAHCMD 286 (23 November 2015) at para 6.

present matter, the applicant only seeks an order to temporarily suspend the permanent residence order and custody, in view of the recent revelations which raise concerns of the safety for D in the mind of the applicant if he is immediately ordered to resume residence with the respondent. The said order is sought pending the determination of the permanent residence of D by a competent court. Even if I may be incorrect in my conclusion, I am of the considered view that having regard to the issues raised by the applicant, this is a proper case in which to exercise my discretion by allowing the matter to proceed before me. It is just and equitable to do so in light of the interests of the minor child implicated, and requiring this court to deal with this application urgently, notwithstanding the proceedings pending in South Africa.

[19] I hold the view, for the above-mentioned reasons, that the requirements for *lis pendens* are not met in the present matter. I, therefore, find that this application is in sharp contrast to the pending litigation in South Africa in all shape and form and, therefore the point *in limine* of *lis pendens* raised by the respondent is misplaced and falls to be dismissed, as I hereby do.

Applicant's case.

[20] The applicant avers that the respondent used to reside at Lachland Farm. On 6 October 2023, he was informed by the respondent's legal practitioners based in South Africa that the respondent relocated to Kuruman, Northern Cape Province, South Africa ('Kuruman').

[21] Although being contentious, the issue of the custody and primary residence of D was agreed to by the parties in a settlement agreement which was made an order of court. The parties agreed on joint custody of the child and further agreed that the primary residence of the child will be with the respondent.

[22] The applicant avers that D arrived in Namibia on 29 September 2023, and was due to return to South Africa on 9 October 2023. The applicant avers further that on 5

October 2023, he received a WhatsApp voice message from Mr DG, the husband of the respondent, and with whom the respondent also has a minor child, JJ, born in 2022.

[23] Mr DG deposed to a confirmatory affidavit filed of record, where he stated that he read the affidavit of the applicant and confirmed the correctness of the averments set out therein that relate to him. The applicant alleges that Mr DG informed him that on 4 October 2023, the respondent left their common home with their minor child, JJ, without informing Mr DG of her whereabouts and she moved to her parents' residence near Kuruman.

[24] The applicant further alleges that Mr DG informed him that he was concerned about the safety of JJ as the respondent was admitted in a mental facility in March 2023 due to severe depression, and that she abuses her prescription medication and alcohol. The respondent's depression to the extent of admission to a mental facility was new to the applicant. He further alleges that Mr DG also informed him that she assaulted him and threatened to kill herself with his pistol.

[25] The applicant further claims that Mr DG also informed him that he approached the Children's Court for the district of Mashinshing Magistrate' Court and obtained an interim order, on an urgent basis, for the respondent to return JJ to him.

[26] In a letter dated 6 October 2023, the respondent's legal practitioners in South Africa stated, *inter alia*, that the respondent moved to Kuruman, and that D will reside with her. The legal practitioners further stated that the respondent will enroll D in school next year. The respondent's legal practitioners threatened to take urgent legal action against the applicant in the event that he did not return D to the respondent.

[27] The applicant further alleges that he resides in a three bedroom house with his fiancé, Ms UK whom he is due to marry in December 2023. D has his own room. He avers that D is well known to his fiancé and she takes care of him as her own. Neither him, nor his fiancé have other children. Ms UK, in an affidavit, confirmed the correctness

of the allegations made by the applicant in his affidavit that relate to her. The applicant avers that he is financially capable to take care of the child and is able to enroll him in school in Windhoek to complete his grade two in the interim.

[28] The applicant further avers that the respondent is presently unemployed and was previously supported by her husband, Mr DG. He is unaware of the financial status of her parents.

[29] The applicant further states that D is a Namibian citizen. He was residing in South Africa with the respondent by way of a pending application for a family visa. He avers that the said application was submitted earlier this year, but no permit or visa is reflected in D's current and valid Namibian Passport. D does not have a valid study permit to be enrolled at a school in South Africa, and if he returns, he will not be permitted to enroll in school in Kuruman.

[30] The applicant contends that it will not be in the best interests of D to reside with the respondent for the time being.

Respondents' case

[31] The respondent deposed to an answering affidavit where she stated, *inter alia*, that she is a South African citizen residing at Kuruman, South Africa. She confirmed her marriage to the applicant, the divorce and the status of D who presently resides with the applicant. She further confirmed that she later married Mr DG, assumed his name, and they have a child JJ.

[32] The respondent stated further that subsequent to the divorce, and together with the applicant, they approached this court to vary the final order of divorce in order to make formal the applicant's access rights to D. On 10 September 2021, this court issued an order awarding the parties joint parental rights, and the primary residence of

D was granted to her. The order granted the applicant access to D during September holidays including 29 September 2023 to 9 October 2023.

[33] The respondent averred that she acquired employment after being appointed as an assistant to the Chief Executive Officer of Arnovox (Pty) Ltd effective 1 October 2023.

[34] The respondent avers that she resided with her husband, Mr DG, at the common home from May 2021 to 4 October 2023, when she left the common home. She claims that she literally escaped from the common home due to the extremely abusive conduct of her husband who is a very aggressive and unstable person, who was diagnosed with impulsive control disorder.

[35] The respondent states that she relocated to her parents' home in Kuruman, Northern Cape Province, where her parents have a home. She claims further that she planned her escape from the common home to coincide with D's visit to Namibia so that he could not witness her relocation. The respondent further alleges that she informed her husband of her departure, and on 5 October 2023, she informed the applicant of her relocation via email and WhatsApp.

[36] The respondent, although denying severe depression, admitted that she suffers from depression and takes medication to control it. This condition, she claims, the applicant is aware of. She contends that there is nothing strange about depression as, according to her, millions of people in the world suffer from depression and take medication to manage their condition. She avers that she voluntarily admitted herself into a mental health clinic, Zwavelpoort Mental Health Clinic, situated in Pretoria, South Africa, during October 2022 for a period of 12 days. She denied abusing prescription medication and alcohol. She also denied assaulting her husband and any attempts to kill herself as alleged by her husband.

[37] The respondent alleges that D is already enrolled at Seodin Primary School in Kuruman to continue with Grade 2. Regarding the visa application for D, the respondent deposed that the visa was applied for on 8 February 2023, and due to the major backlog of visa applications at the Department of Home Affairs in South Africa, D is allowed to travel between South Africa and Namibia only with the proof that he applied for a visa.

Replying papers

[38] The applicant contends that the employment agreement annexed to the respondent's answering affidavit reveals that she accepted employment on 1 October 2023, in Kuruman while she only left the common home on 4 October 2023. It is contended further that the respondent knew of her relocation to Kuruman already by 1 October 2023, but she opted not to timeously inform the applicant of a change that would have an impact on D.

[39] The applicant produced an affidavit deposed to by the respondent and commissioned on 29 July 2022 where she described Mr DG, her husband's character, as follows:

'82.2 I refer the Court to the affidavit of third parties annexed hereto where my husband's true character is described. He is a wonderful man who has great relationship with D… He is also a great dad to our 3-month-old son.

82.3 D… loves and respects my husband and call him "Pappa" which he does out of his own free will. Where my husband goes, D… goes. It gives my husband great pleasure to see D… happy and excited. They hunt, go fishing and also farm together. After supper in the evenings D… will lie next to my husband, almost on top of him, whilst we are watching television. When we braai or relax, D… will sit on my husband's lap whilst chatting and making jokes. No one tells D… to do any of these things. He does it *(sic)* spontaneously because he feels loved and protected by my husband. My husband helps me to take care D… and does a wonderful job. Instead of being jealous of their relationship, the applicant should be grateful that my husband is a good and kind stepfather.'

[40] This, it is contended by the applicant, stands in total contrast to the picture painted of her husband as a very aggressive, abusive and unstable person.

[41] The applicant contends that the application for a visa for D, valid until 5 April 2023, provides that D is only authorised to temporarily reside in the Magisterial District or Municipal Area of Thaba Chweu pending the application. Thaba Chweu district is in Mpumalanga Province while Kuruman is in the Northen Cape Province.

The further affidavit of Mr DG

[42] In light of several damning allegations made particularly by the respondent against Mr DG, which also have a bearing on this matter, the court granted an opportunity to Mr DG to answer thereto. In an affidavit, Mr DG deposed, *inter alia*, that he lived with the respondent in Mpumalanga Province and not Limpopo Province as suggested by the respondent. He stated further that he was not aware that the respondent accepted and entered into an employment contract until he read her answering affidavit.

[43] He denied the assertions that he is a very aggressive, abusive and an unstable person. To the contrary, he averred that it is the respondent that is very aggressive, abusive and unstable, particularly when she abuses alcohol and prescription medication which occurred regularly. He expressed shock at how he, in the eyes of the respondent, changed from being a good and loving parent and husband to an aggressive, abusive and an unstable person.

[44] Mr DG denied the allegation that he was diagnosed with impulsive control disorder but stated that he was diagnosed with a sleeping disorder.

[45] Mr DG further referred to the WhatsApp messages received from the respondent in the afternoon of 5 October 2023, which messages were annexed to the respondent's answering affidavit, where the respondent stated as follows:

> 'I allowed you to treat my D… child nastily and harshly for too long.'

'You want to control and rule everything about me. I may not make any decisions regarding D…, I may not give him fair access and communication between him and …(CJV).'

'If I for example says that I agree that D… and (CJV) … should spend enough time together, you can't see the fairness of that at all.'

'You use degrading crude language … in front of the children. (CJV) … is cursed and badmouthed in front of D...'

[46] The above assertions were denied by Mr DG. He was adamant that the respondent suffers from severe depression and she was admitted into a mental health facility on the recommendation of a psychiatrist. He further insisted that the respondent assaulted him in the presence of the housekeeper and the children, and also attempted to shoot herself with a firearm.

[47] On her part, the respondent deposed that her loving and respectful opinion of her husband began to change during the latter part of 2022, when he began to act more aggressively and abusively. She confirmed that her husband works at a mine site and was mostly not at home during the day. She denied that her husband treated D as his own.

[48] She also admitted that her husband never disallowed D from having access and communication with the applicant. She stated further that she is in favour of D having as much access to the applicant as possible. She concluded that D and JJ are best friends and to separate them would be traumatic and devastating to both of them.

The Children's Advocate's report

[49] On 27 October 2023, the court ordered the Namibian Children's Advocate to carry-out an investigation on the status of D and the suitability of the residence and to provide a report. The advocate promptly attended to the task and filed her report on time which is based on the evaluation conducted by a social worker, Ms Aune Heita. In the report, Ms Heita found that both the applicant and the respondent are capable of taking care of D. She, however, recommended that D's custody and control be awarded to the respondent.

Meeting with D

[50] On 16 November 2023, I met with D together with Ms Heather Harker, the Children's Advocate in Namibia and at a later stage the meeting was joined by Ms Garbers-Kirsten and Mr Small. The meeting occurred in the Judges' Boardroom and in an informal and child friendly setting. Ms Harker recorded the conversation and prepared a report to that effect which was filed of record. The court expresses its gratitude for the assistance rendered by Ms Harker albeit at short notice.

[51] D explained that he was attending school for about three weeks, where he made friends and he enjoys his school. In comparison to his former school in South Africa, he stated that he does not have many friends there and he prefers his school in Namibia. Regarding home setting, D stated that in South Africa he stayed with his mother and his stepfather on a farm. He enjoyed the farm. He, however, had no friends on the farm. There is one dog on the farm and his young brother who is too young to play with. In Namibia, he stays with the applicant and his fiancé and he has his own room and the house and a yard where he plays. He stated that he prefers to stay in Namibia where he goes fishing and together with his friends they ride bicycles.

Arguments

[52] At the initial hearing it was argued by Mr Kasita that the court should consider the facts set out by the applicant, together with the facts which the respondent cannot dispute and determine whether, on such facts, the applicant can obtain the relief sought. He laid great store on *Webster v Mitchel*.[4]

[53] Mr Kasita reminded the court of the provisions of s 3 of the Child Care and Protection Act 3 of 2015, which states that one of the factors to be considered by the court in deciding the best interest of the minor child, is to determine as to which place can a child be brought up within a stable family environment. He argued that the respondent's residence does not qualify to be a stable family environment.

[54] In subsequent heads of argument filed by Ms Garbers-Kirsten, still for the applicant, she argued that the applicant managed to establish a case for the relief sought. She particularly emphasised that the court should adequately consider D's views on the dispute between the parties that concern him, who mentioned, on two separate occasions, that he wishes to reside with the applicant and only visit the respondent. She relied on the decision of the High Court of Gauteng, South Africa of *DD v MD*.[5]

[55] Mr Small was not to be outmuscled even by the number of counsel engaged by the applicant. He argued that no cogent reasons were advanced by the applicant to change the status of the residence of D. He argued that D was to be enrolled at Seodin Primary School in Kuruman to continue with his grade 2. Mr Small further referred to a judgment from Mbombela High Court in Mpumalanga Division delivered by Langa AJ, where the court decided the issue of custody of D in favour of the respondent.

[56] In respect of the invitation to consider the child's voice, Mr Small argued that while courts have embraced judicial interview of minors, the opinion of the minors should be approached with circumspection considering the age, maturity and stage of

[4] *Webster v Mitchel* 1948 (1) SA 1186 (W) 1189.
[5] *DD v MD* (093505/2023) [2023] ZAGPPHC 1231 (7 November 2023).

development of the minor child concerned. Reliance was placed in this regard on the decision of the Supreme Court in *CJS v CS (Born S)*.[6]

[57] Mr Small argued further that although D appears to be intelligent, well-mannered and well-spoken, he is only eight years old and focused on fun activities that he can do with his father. He submitted that it is apparent from D's answers that he lacks appreciation of the impact that the change in his permanent residence will mean for him. For that, together with the fact that no credible evidence was placed on record to suggest that the respondent is incapable of taking care of D, so it was argued, the application must fail.

[58] Mr Small further urged the court not to adversely consider the respondent's depression against her, as more often than not, the world over, depression suffered by mothers has been used as a tool to discredit them as unworthy to have custody of their children. He submitted that the respondent's depression is manageable. He ultimately called for the dismissal of the applicant's application with costs.

The law

[59] It is settled law that this court is the upper guardian of minors. It follows, therefore, that the overriding consideration in matters of custody, residence of children and other related matters, is what the court considers to be in the best interests of the child.

[60] The Child care and Protection Act,[7] which was promulgated to, *inter alia*, set out the principles regarding the best interest of children provides as follows in s 3:

'**Best interests of the child**

3. (1) This Act must be interpreted and applied so that in all matters concerning the care, protection and well-being of a child arising under this Act or under any proceedings, actions and

[6] *CJS v CS (Born S)* 2021 (4) NR 1208 (SC).
[7] Child Care and Protection Act 3 of 2015.

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.

(2) In determining the best interests of the child, the following factors must be taken into consideration, where relevant –

(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; Republic of Namibia 18 Annotated Statutes Child Care and Protection Act 3 of 2015

(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 –

(i) both or either of the parents; or

(ii) (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.'

[61] Geier J in *McDonald v Moor*[8] cited with approval the following remarks by the full bench of the Cape Provisional Division, in *J v J* [9] :

'[20] As the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child.[10] In *Terblanche v Terblanche* [11] it was stated that when a court sits as upper guardian in a custody matter -

. . . it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.'

[62] In the matter of *D v P*,[12] a decision of the South Gauteng High Court of South Africa, the court had occasion to consider its role as the upper guardian of minors and remarked that:

'The courts as upper guardians of minors have the daunting task in deciding the destiny of minors when their parents, either due to their own actions or due to particular circumstances forced upon them, cannot agree on what would be in the best interests of the minor children. More than often, the parents tend to see the best interests of their children through their own self cantered interests, and then pose those interests as being that of the minor child. Rightly or wrongly, that is life. It does, however, impose a greater duty upon the court to determine what the best interests of the minor child are.'

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[8] *McDonald v Moor* (A 244-2015) [2015] NAHCMD 235 (21 September 2015) para 36.
[9] *J v J* 2008 (6) SA 30 (C)
[10] *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA) para 32 at 200E; see also para 36 at 201B. See further below para [36].
[11] *Terblanche v Terblanche* 1992 (1) SA 501 (W) at 504C.
[12] *D v P* (82527/2016) [2016] ZAGPPHC 1078 (15 December 2016) para 2.

[63] I find that the above authorities represent the true exposition of our law, as they emphasise the principle and duty of the court as the upper guardian of the minors and expound on such duties. I further endorse the approach of the court to decide matters involving children set out in the above decisions as being in concurrence with our legal position.

Analysis

[64] It is common cause between the parties that subsequent to their divorce, they applied to this court for an order that regulates the custody and the primary residence of D. An order to that effect was granted by this court on 10 September 2021, which provides, *inter alia*, that the parties shall receive joint parental rights and responsibilities over D. It was further ordered in line with the settlement agreement concluded between the parties and made an order of court, particularly regarding clause 2 thereof that the primary residence of D shall be with the respondent in South Africa. It was further ordered by agreement between the parties that the respondent will take D to Johannesburg International Airport for him to fly to Namibia and the applicant will take D to and from Windhoek International Airport to fly back to South Africa during D's visits to the applicant.

[65] The applicant purchased a return flight ticket for D to depart from South Africa to Namibia on 29 September 2023, and to return back to South Africa on 9 October 2023. D arrived in Namibia on 29 September 2023.

[66] The applicant contends that circumstances changed that necessitated the launching of this application in order to temporarily suspend the operation of clause 2 of the settlement agreement regarding the primary residence of D pending the determination of the dispute on the said primary residence by a competent court, and that such primary residence be temporarily ordered to be with the applicant. The parties locked horns on the relief sought by the applicant.

The legal status of D in South Africa

[67] It is common cause that the D is a Namibian citizen and has no South African visa. It is undisputed that no visa from South Africa is stamped or provided for in his current and valid Namibian passport. The established fact is that the respondent applied for an authorisation for D to remain in South Africa. In February 2023, D was granted an authorisation to remain in South Africa in terms of their statutory laws and this authorisation was annexed to the respondent's answering affidavit.

[68] The authorisation referred to above provides that:

'**DEPARTMENT OF HOME AFFAIRS**
REPUBLIC OF SOUTH AFRICA

AUTHORISATION FOR ILLEGAL FOREIGNER TO REMAIN IN THE REPUBLIC PENDING APPLICATION FOR STATUS
[Section 7(1)(g) read with section 32(1); Regulation 30(2)]

Particulars of the holder of this authorisation

Full name(s) and surname: D …
Date of birth: 2015/04/07 Passport number: P …
The holder of this authorisation may temporarily reside in the Republic of South Africa in the Magisterial District or Municipal Area of Thaba Chweu pending the outcome of an application for a status. The authorisation is valid until: 05 April 2023

As an illegal foreigner you will be listed as an undesirable person in terms of section 30(1)(h) of the Act, should you depart from the Republic prior to the finalisation of your application for status

Signed

_____

Director-General

…’

[69] The respondent avers that despite the above authorisation providing that it is only valid until 5 April 2023, D flies between Namibia and South Africa with the said authorisation without difficulty. She further avers that due to the major backlog in visa applications in South Africa, D is allowed to travel with only proof that he applied for a visa.

[70] The difficulty with the respondent’s contention is that D may have been allowed to travel in and out of South Africa using the said authorisation, but that does not depart from the law. The law is that D was, in February 2023, granted authorisation to remain in South Africa and such authorisation was valid until 5 April 2023. The respondent produced no visa permitting D to continue to reside in South Africa, while the authorisation referred to above lapsed on 5 April 2023. This, in my considered view, demonstrates that the authorisation accorded to D to remain in South Africa lapsed on 5 April 2023, after which date, no authority existed permitting D to remain in South Africa.

[71] The respondent, at the very least, filed no confirmatory affidavit from an authorised officer at the Department of Home Affairs to confirm her assertions that D could still remain in South Africa post 5 April 2023, due to the major backlog in visa applications. I find that this allegation, constitutes inadmissible hearsay and stands in total contrast to the Immigration laws of South Africa and the aforesaid authorisation. I further find that it has not been established that D had any legal status in South Africa post 5 April 2023, save for being an illegal foreigner.

[72] As the upper guardian of D, this court finds that it will be in the best interests of D that he remains in Namibia where he is a fully fledged citizen and enjoys all the rights and privileges of being a Namibian citizen. I further find that it will be amiss of this court

to send its minor and a citizen of this country, D, to another country where he is considered an illegal foreigner, with no authorisation to be or remain in that country. I find that the best interests of D dictate that his residence be temporarily ordered to be with the applicant, pending the determination of his primary residence by a competent court.

[73] Even if it could be argued that the authorisation can entitle D to reside and remain in South Africa, which it legally does not, the authorisation in question permitted D to temporarily reside in the Magisterial District or Municipal Area of Thaba Chweu and not Kuruman where the respondent presently, according to her affidavits, resides. Thaba Chweu and Kuruman are situated in different provinces. If D could reside in Kuruman even during the period of the validity of the authorisation, then his residence would violate such authorisation and could not receive the approval stamp of this court where it is in conflict with the terms of the authorisation.

[74] For the above reasons, this matter could be disposed of at this stage in favour of the applicant, but for completeness' sake I proceed to address other issues.

The child's voice

[75] The Supreme Court in *CJS v CS (supra)* stated the following regarding the approach to deciding whether a child should be relocated or not:

'[42] Thirdly, guidance can also be had from the approach in *F v F*[13] where the above principles stated in the *Jackson* case[14] were further elaborated on as follows:

"[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

[13] *F v F* 2006 (3) SA 42 (SCA) ([2006] 1 All SA 571) paras 10 – 13.
[14] *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 318E – I.

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.'" (Emphasis added)

[76] I agree with the argument raised by Mr Small that judicial interview of the minor child should be allowed, but depending on the facts of each case, and in some cases with circumspection, considering the child's age, maturity and stage of development. A strong case, however and in my view, can be made out that it is best to hear the view of the child and this much was recognized by the legislature who provided for the consideration of the views and opinions expressed by the child.[15]

[77] I hold the view that since the dispute between the parties is about the care of the child, it is only befitting that the child, depending on his or her age, maturity and development stage, be heard on the subject that concerns him or her. Courts preach the *audi alteram partem* rule day in, day out, and it is only fair that the child whose welfare is at stake takes part in the proceedings that will determine his or her fate. Children should be afforded an opportunity to be involved in the process that affects them and determines their future. I take cognisance of the fact that a child may be influenced by one of the parents, another child or any other person, but this, in my view, should not be elevated to a bar from hearing the views and opinions of the concerned child for appropriate consideration.

[78] The views and opinions of the child expressed should be balanced with all other relevant factors in order to arrive at a decision that is in the best interests of the child.

[79] In *casu*, the court sanctioned an investigation which included an interview with D, and ordered the Child Advocate to provide a report. This, being an urgent application, resulted in the investigation being conducted within a very short period of time. The investigation conducted by Ms Heita concluded that both the applicant and the

[15] Section 3(2)*(c)* of the Child Care and Protection Act.

respondent are capable of taking care of D. She recommended that D's custody and control be awarded to the respondent.

[80] Ms Heita stated that in the report that D prefers to stay with the applicant in Namibia and only wants to visit the respondent during the holidays. The other observation made by Ms Heita is that it is critical to ensure that siblings are kept together. Sound as this latter observation is, its application should be made on a case by case basis. In the present matter, D's only sibling, JJ, who resides with the respondent forms the amphitheatre of the custody dispute between the respondent and Mr DG. It is not farfetched to consider that litigation is not preconceived and the result thereof can be unpredictable. The possibility may, therefore, not be remote that if the residence of D is awarded to the respondent, the court where the custody dispute for JJ is pending may award it to Mr DG, and still leave D without his sibling at the respondent's residence.

[81] In an effort to comply with my duties imposed by the Child Care and Protection Act, as the upper guardian of the child, and together with Ms Harker (the Child Advocate), I interviewed D in the boardroom and in a setting that I considered to be child friendly. At a later stage with the concurrence of the child, we were joined by the legal practitioners of the parties. I needed to understand the child's views and opinions from him and assess his emotional state as we engaged in the discussion of his relocation.

[82] D appeared to be an intelligent young boy who is well mannered. He was clear and consistent that he prefers to reside with the applicant, while having the opportunity to visit the respondent. He mentioned that he has more friends in in the neighbourhood in Namibia than in South Africa. He is happier at the school where he is enrolled in Namibia compared to that in South Africa. Emotionally, it was evident that D wishes to reside with his father. The views and opinions expressed by D, in my considered opinion, cannot be determinative of the dispute of custody or the applicant's application. This is so because the court is duty-bound to consider all the relevant facts brought before it in order to decide the paramount question of what is in the best interest of the

child. D's views and opinions are but only some of the factors that weigh in favour of granting the relief sought by the applicant.

[83] Accusations of impropriety flew from one person to the other in a triangular fashion, involving the applicant, the respondent and Mr DG. The accusations ranged from, *inter alia*, that the respondent suffers from severe depression and abuse of prescription medication and alcohol, to assault and attempted suicide. Mr DG was accused by the respondent of being aggressive, abusive, and an unstable man and a horrible stepfather, while at some stage he was regarded by the same respondent as the good and caring husband and stepfather. The applicant was, *inter alia*, accused of not stating true facts to the court.

[84] Even in the face of the different versions between the parties inclusive of Mr DG, and considering that none of the parties applied to have the application referred to oral evidence or cross-examination, I hold the view that this matter can still be ably decided on the basis of the papers filed of record.

[85] The conclusions of Ms Heita, in my view, are not supported by the established facts of the matter, which point in favour of granting the temporal custody to the applicant. The views and opinions expressed by D are considered to support the application. The concerns for the safety of D, however minimal cannot be ignored, particularly where the text messages and the report by the Psychologist, Dr Laubscher suggest animosity from Mr DG to D. The acknowledged fact that the respondent was admitted in a mental health facility due to depression or severe depression, in my view, also weighs in favour of granting the application.

[86] It is also an established fact that the respondent has recently relocated to Kuruman, a new environment which D will need to familiarise with. It is not ascertained as to how detrimental the change in the environment will be to D, if he is to reside in Kuruman. It suffices to state that it will be in the best interests of D to reside at a place

that he is familiar with as opposed to a foreign place. Over and above her relocation to a new place, the respondent is further subjected to differences with Mr DG including litigation with him over the custody of JJ. I find these factors not to be in the best interests of D to relocate to Kuruman, not to mention that he was authorised to remain in Mpumalanga and not in the Northern Cape, in Kuruman.

Conclusion

[87] In view of the findings and conclusions made hereinabove, I am of the considered opinion that the applicant established facts and circumstances that entitle him to the relief sought from this court. The established facts demonstrate that it is in the best interests of D that his residence be temporarily ordered to be with the applicant, with the respondent having reasonable access to D. It follows that the applicant's application ought to be granted.

Costs

[88] It is an established principle of our law that, ordinarily, costs follow the result. The court further retains a discretion to be exercised judicially, in considering whether or not to award costs to a party. In *casu*, the applicant is successful in his application and should be awarded costs.

Order

[89] In the result, I make the following order:

1. The applicant's application to dispense with the forms, services and time periods is granted and the matter is heard as one of urgency.

2. Clause 2 of the settlement agreement, made an order of court on 10 September 2021, pertaining to the primary residence of the minor child, D, is temporarily

suspended pending the determination of the dispute regarding the primary residence of D by a competent court.

3. The primary residence of D should temporarily be with the applicant, pending the determination of the dispute of such primary residence by a competent court.

4. The respondent must pay the costs of suit of the applicant, including costs of one instructing and one instructed legal practitioner.

5. The matter is regarded as finalised and removed from the roll.

_____

O Sibeya

Judge

APPEARANCES

APPLICANT:	H Garbers-Kirsten Instructed by PD Theron & Associates
RESPONDENT:	A J B Small Instructed by Phillip Swanepoel Legal Practitioners