

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2024/00167

In the matter between:

AH

APPLICANT

and

PAH

RESPONDENT

**Neutral citation:** *AH v PAH* (HC-MD-CIV-MOT-GEN-2024/00167) [2024] NAHCMD 242 (21 May 2024)

**Coram:** USIKU J

**Heard:** 29 April 2024

**Delivered:** 21 May 2024

**Flynote:** Applications and motions – Urgent applications – Relocation – Mother, who is the primary caregiver, seeking court permission to relocate to Botswana with her minor child, without obtaining consent or signature of the father of the minor child – Mother granted permission to relocate with the minor child.

**Summary:** The applicant (mother) approached this court on urgent basis, seeking the granting of an order allowing her to relocate with her minor child to Botswana, without having to obtain the consent or signature of the respondent (father). This was after the respondent refused to sign the necessary consent papers.

*Held* that since the matter involves the interest of a minor child, it should be treated as one of urgency.

*Held further* that it is in the interest of the minor child that she relocates with her mother to Botswana.

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### **ORDER**

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1. The applicant's non-compliance with rule 73 of the Rules of this Court insofar as it pertains to forms and service, is condoned and the application is heard as one of urgency.
  2. The respondent's consent, signature or participation in regard to any step required to enable the applicant to remove the minor child, Z, from Namibia to Botswana, is dispensed with.
  3. The respondent is ordered to pay the applicant's costs of this application, and such costs include costs of one instructing and one instructed counsel.
  4. The matter is removed from the roll and is regarded as finalised.
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### **JUDGMENT**

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USIKU J:

#### Introduction

[1] This is an opposed urgent application. In this application, the applicant in essence, seeks an order that would enable her to permanently remove a minor child from Namibia to Botswana without having to obtain the respondent's consent, signature or participation.

#### Background

[2] The parties were married to each other. They got divorced on 8 May 2023. Three minor children were born of the marriage. This case concerns the youngest minor girl. I shall refer to the minor girl who is the subject of the present dispute as 'Z'.

[3] Prior to the granting of the final order of divorce, the parties had entered into a settlement agreement which was ultimately made an order of court. In terms of the settlement agreement the parties agreed that they shall have joint custody of all three minor children but the primary residence of two of the children, which includes Z, shall be with the applicant. The settlement agreement further provides that the respondent grants permission to the applicant to relocate with Z to Botswana.

[4] For the applicant to relocate to Botswana with Z, the respondent's general permission as per the settlement agreement is not enough. He is required to also sign Form 25 in terms of s 236 of the Child Care and Protection Act 3 of 2015 ('the Act') read with regulation 91. The respondent refuses to sign the necessary consent papers. Subsequently, the applicant brought the present application.

#### The application

[5] Insofar as the issue of urgency is concerned, the applicant states that she is required to relocate to Botswana as she has taken up employment in that country and that Z is required to resume school in Botswana on 14 May 2024.

[6] The applicant contends that the respondent's stance in this matter is unreasonable and that his refusal to sign the necessary papers precludes her from relocating with Z to Botswana and from earning a salary.

#### Opposition to the application

[7] The respondent raises two points *in limine*, namely, lack of urgency and lack of jurisdiction. In regard to the question of urgency, the respondent contends that the applicant completely failed to meet the requirements of rule 73(4). In regard to the question of jurisdiction, the respondent argues that the High Court is not the court of first instance pertaining to matters that relate to the status, interest and well-being of children, but that the Children's Court is the court of primary jurisdiction.

[8] As for the merits of the application, the respondent submits that the most important factor that this court should consider before it grants or dismisses the application, is the best interest of Z.

[9] The respondent avers that he is unwilling to sign the necessary consent form because he is of the view that the relocation will not be in the best interest of Z. The respondent contends that the applicant does not have the financial means to take care of Z and provide her with the basic requirements of adequate housing, medical care, schooling, food and clothing.

### Analysis

[10] Insofar as the issue of urgency is concerned, it is not in dispute that the present matter concerns a relocation of the minor child to Botswana with her mother. Legal authority on matters concerning children's rights are to the effect that the urgency requirements are to a certain extent, relaxed and the interest of the children are given a chance to be finally determined with less formality and more expedition.<sup>1</sup>

[11] With the foregoing considerations in mind, I am of the view that the facts of the present matter require that the present application be finally determined with expedition, I shall therefore, exercise my discretion in favour of entertaining this application on an urgent basis.

[12] As regards to the question of jurisdiction, I am of the view that the gist of the application is to give effect to the terms of a settlement agreement which was already made an order of this court. I am therefore, of the view that the argument of the respondent on the issue of jurisdiction is, on the present facts, without merit. The point *in limine* concerning jurisdiction therefore, stands to be dismissed.

[13] It is common cause between the parties that the respondent had granted the applicant permission to relocate with Z to Botswana, under the settlement agreement. It is also common cause that a social worker (Shirley Brandt) had found that Z wishes to relocate to Botswana with the applicant.

[14] From the facts as presented by the applicant, it appears that the applicant has made all arrangements to relocate together with Z to Botswana. The facts on record

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<sup>1</sup> *African Stars Club (Pty) Ltd v Benjamin* (HC-MD-CIV-MOT-GEN-2021/00155) [2021] NAHCMD 263 (27 May 2021) para 55.

show that the applicant has secured employment in Botswana. She has secured accommodation and Z has a space reserved for her at a primary school in Botswana.

[15] On the facts on record, I am of the view that the welfare of Z will be best served by her being relocated to Botswana, in the primary care of her mother. In other words, it is in the best interest of Z that she relocates with the applicant to Botswana. The applicant is therefore, entitled to the relief she seeks.

[16] In regard to the issue of costs, the general rule is that the successful party should be given his/her costs. There are no exceptional circumstances justifying departure from the general rule. The applicant seeks a punitive costs order against the respondent on account that his opposition to the application is malicious and vexatious. I am not persuaded that on the facts of the present case, there are sufficient grounds to justify a punitive costs order. In my view, costs on the ordinary scale are appropriate.

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

1. The applicant's non-compliance with rule 73 of the Rules of this Court insofar as it pertains to forms and service, is condoned and the application is heard as one of urgency.
2. The respondent's consent, signature or participation, in regard to any step required to enable the applicant to remove the minor child, Z from Namibia to Botswana, is dispensed with.
3. The respondent is ordered to pay the applicant's costs of this application, and such costs include costs of one instructing and one instructed counsel.
4. The matter is removed from the roll and is regarded as finalised.

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B USIKU  
Judge

## APPEARANCES

Applicant: H Garbers-Kirsten (with her K Morland)  
Instructed by Morland Incorporated, Windhoek

Respondent: R White (with him T Rieth)  
Instructed by Rieth Legal Practitioners, Windhoek