IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE No. 957/18**

In the matter between

RONEN TORGEMAN **Applicant**

And

VANESSA CHRISTINA TORGEMAN (BORN FLORA) **Respondent**

Neutral citation: Ronen Torgeman v Vanessa Christina Torgeman (Born Flora) (957/2018) [2018] SZHC 234 (14 December 2018)

Coram **:** **MAMBA J.**

Heard **:** **30 November 2018**

Delivered **:** **14 December 2018**

[1] *Civil Law and Procedure – Custody of minor children – Custodian parent deciding to emigrate to a foreign country with children without the consent of the non-custodian parent who has a right of access to them. Non-custodian parent objecting to enrolment of children in a school in foreign country. Arbitrators appointed to decide issue unable to do so. Court as upper guardian of all minors to fully investigate issue and make a decision that is in the best interests of the children.*

[2] *Civil Law and Procedure – Custody of minor children – disputes of fact arising – matter referred to oral evidence for decision regarding custody.*

[1] The applicant is a 45 year old businessman of Eswatini and resides at Emoyeni Drive in Mbabane, whilst the respondent is a 36 year old South African citizen and resides at Nshakambili Road in Ezulwini.

[2] The parties were married to each other on 05 April 2006 in Tel Aviv, Israel, by Jewish rites. The marriage was out of community of property. Two children were born out of the marriage, namely; Talia and Sofia who were born on 12 November 2007 and 31 January 2014, respectively. They are both girls.

[3] Talia is 11 years old and is a grade 5 pupil at Usuthu Forest Primary School in Eswatini, Sofia is 4 years old and is a pupil at Montessori Pre-School in Mbabane, Eswatini. Both girls are in the custody of the respondent and live with her at the aforementioned address.

[4] The parties' marriage was terminated by an order of this court on 27 July 2018. Following the said divorce decree, an agreement of settlement entered into by and or between the parties was made an order of court.

[5] In terms of the said order of court, the respondent was granted custody of the children and it was specifically noted therein that the children 'shall reside with her [and] she shall be entitled to make decisions regarding their welfare and day to day living arrangements.'

[6] A further term of the agreement is that any decisions, such as, which school and or University that the children will attend, will be decided

upon by both parties in consultation with each other on the understanding that the interests of the minor children in question will be paramount and that any such decision, shall be in their best interests; (per clause 4.1). In the event that the parties are, for whatever reason, unable to reach an agreement on such issues, i.e, on any major decision; the matter would be referred to two stated arbitrators, whose decision thereon shall be final and binding on both parents.

[7] Clause 6.4.1 entitles the respondent to reside in the erstwhile marital home in Ezulwini until Sofia, the youngest child born of the marriage, attains the age of 18 years. Before this eventuality comes to pass, the applicant shall have no right whatsoever to evict the respondent from the said home.

[8] The agreement also records that, in the event the children have to travel outside the country, both parents shall be obliged to sign and execute all documents to facilitate such travels. The parties also agreed that the children shall be raised in the Jewish faith.

[9] As the non-custodian parent, the applicant's visitation rights are guaranteed, or at least provided for in the court order. For instance, the children shall spend all Jewish and religious holidays, including Passover and Chanuka, with the applicant. The children shall spend New Year

celebrations on alternate basis with their parents. The order also makes provision for the applicant to have access to the children 'at all reasonable times; by the applicant giving at least 48 hours' notice to the respondent.

Additionally, the applicant shall have access to the minor children on every second weekend after school and all mid-term breaks.

[10] The children, the order provides further, shall spend father's day and mother's day with their father and mother respectively.

[11] The applicant, it is further recorded, shall be responsible for all medical aid and allied expenses and educational needs of the children, including both at school and tertiary level.

[12] The applicant is further obliged to pay a monthly sum of E23,500.00 for household expenses to the respondent. This is so whether the respondent resides in the erstwhile marital home or not. Half that amount, however, shall be payable by him in the event that the respondent remarries or forms a relationship with another person whilst still residing in the said home or house.

[13] In addition to the above expenses, clause 6.6 obliges the applicant to pay to the respondent a monthly sum of E10,000.00 as maintenance for the minor children.

[14] The applicant states that the respondent assured her, during the divorce settlement negotiations, "that she will not leave Eswatini for the sake of the children." However, 'less than two months after the divorce order was issued, the respondent 'has stated that she intends to leave Eswatini

and to reside in the Republic of South Africa at Vanderbijlpark with the children immediately after schools close for the end of year holidays. She has also applied for the children to be enrolled at Waterstone College in Kibler Park, Johannesburg. This College is about 60 km from Vanderbiljpark. The respondent's sister's children also attend this school. It is common cause

that the children have been accepted at this school or College for the 2019 school year.

[15] The applicant has, it is common cause, not consented to the children relocating and schooling in the Republic of South Africa. He avers that he does not consider it in the best interests of the children to do so. The applicant avers further that such a move or decision is 'a major decision' as referred to in the deed of settlement and therefore requires a decision by both parties, failing which, a decision by the appointed arbitrators. Regrettably though, the arbitrators have also failed to reach a decision on such matter and thus the applicant has filed this application wherein he claims inter alia for an order:

> '3. That pending finalization of this matter a rule nisi do hereby issue calling upon the respondent to show cause … why the following order should not be made final:
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> …
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> 3.2 That the respondent be interdicted from relocating the minor children … from Eswatini to any foreign country without the express written consent of the

applicant and be interdicted from removing the said minor children from the jurisdiction of the above Honourable court for purposes of enrolling them in or for them to attend any school or other educational institution or facility including home schooling in another country, without the express written consent of the applicant.

3.3 In the event that the respondent persists with her intention to relocate with the children to a foreign country that:

3.3.1 The order … dated [27] July 2018 be varied by custody being awarded to the applicant;

3.3.2 The agreement of settlement incorporated therein, be deemed to be amended accordingly in all material respects;

3.3.3 Either of the parties may approach the above Honourable court to make provision for defined rights of access by respondent to the said minor children;

3.3.4 The respondent be ordered to deliver the minor children to the applicant in Eswatini prior to her departure from Eswatini;

…

8. Costs of suit including the costs of Counsel as certified in accordance with High Court Rule 68 (2);

[16] In motivating the above prayers or order, the applicant states that relocating the children to a foreign country requires his express decision inasmuch as it is a major decision. He states that it 'is a radical and far reaching life changing decision.' He says it would have 'a monumental impact on the lives of the children' and adversely affect his rights of access to them, once the children are in a foreign country. He gives an example of the fact that he has been solely responsible for the religious upbringing of the children and most of the significant Jewish events have always been celebrated with the children at his parental home in Mbabane.

[17] The applicant fears that the children may be exposed to physical danger in the Republic of South Africa which has a high crime statistics, especially in the Gauteng Province where the children would be based. He also states that he desires that the children should do their Secondary and High School at Waterford, his alma mater. The first born, he states, has expressly told her parents that she would want to attend the said school in 2020, and has to file her application next year for that purpose.

[18] It is the applicant's contention that it would not be in the best interests of the minor children to relocate to RSA but rather to remain in Eswatini in an environment and amongst people they are familiar with or are used to. He also complains about the long distance they would travel from Vandebiljpark to Waterstone College, their prospective home and school respectively.

[19] The applicant avers that he is a good and caring father and is thus a fit and proper person to have custody of the children. In the event he is awarded custody, he shall reside in the house at Ezulwini, where the children live, currently.

[20] The applicant states further that he is so fearful of the environment in RSA, that a few years ago he declined a very lucrative job offer or opportunity in Gauteng.

[21] This application was launched ex parte and on a certificate of urgency. It was set-down for the 19th day of November, 2018, on which day this court granted the rule nisi as prayed. The Rule Nisi was made returnable on 30 November 2018; on which date it was extended to today.

[22] The respondent states that her marital surname is Turgeman and not Torgeman. I note though that in the Deed of Settlement already referred to above, her surname is the latter. The applicant has, I believe, adequately explained this in this affidavit, and I do not think that this issue needs any further attention by the court. Ultimately, I think, this is pettifogging by the respondent.

[23] The respondent has stated that she has a right to reside wherever she wants and in terms of the court order, the minor children have a right to reside with her. In this instant, she has decided to relocate to South

Africa and in the process, the children have to relocate to that country with her. She

states further that this shall in no way interfere with the rights of the applicant to have access to the children as provided in the court order. She denies that she assured the applicant that she would live in Eswatini but says she only offered to remain in the country pending the divorce action and that she did so in the best interests of the children. She has also averred that she informed the applicant of her decision to relocate to South Africa on 10 September 2018 and 10 days later told him about enrolling the children at the relevant school and effectively asked him for his decision on the suitability or otherwise of the said school. One of the reasons, she chose this particular school, she says, is that it is a good one and the children already [have] cousins and friends there. The children would be transported to the school by the respondent's family. This arrangement was related to the applicant as early as the 4th day of October 2018. The applicant did not respond to this information but only decided to file this urgent application on 19 November 2018.

[24] It is the respondent's assertion view that she is a South African citizen and so are the children and therefore she is merely returning to her own country. She states that she is in Eswatini on a resident permit. Her decision to return to South Africa with the children does not constitute a major decision, she says. It is her view that South Africa is not far from Eswatini and taking the children with her to that country would not adversely or unduly interfere with the applicant's rights of access to them. She also makes the point that the applicant regularly travels to Johannesburg and thus he would be able to exercise his rights of access to the children without any undue hardship or restraint.

[25] In South Africa, the respondent plans to stay, with the children, at her sister's house which is close to her parental home. This would, however, be a temporary measure until she can secure a suitable accommodation for herself and the children. She adds further that:

> 'My parents have played an important role as grandparents and have regularly come to Swaziland to care for the children when the applicant and I travelled even though the applicant's parents live in Eswatini. We would often leave the children with my parents in South Africa at times when we travelled.
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> …
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> The applicant's sister and his brother Shimon have left Eswatini and his other brother Dror is contemplating leaving Eswatini because his wife Galit has moved to Israel with their son. The applicant's parents are out of Eswatini travelling for most of the year.
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> I therefore wish to emphasise that the children have a better support system in South Africa as opposed to the situation that exists in the applicant's family.'

[26] The applicant has an Eswatini and Israeli citizenship and 'does not fulfil a nurturing role and has never done so.' The respondent avers further that she has always been fully involved in the day to day welfare of the children

and is able and willing to help them in their school or educational work. On the contrary, the applicant has never been involved in such tasks.

[27] In his replying affidavit, the applicant basically reiterates that by taking the children with her to South Africa, the respondent will interfere with his rights of access to them and would not be in the best interests of the children. He also clarifies that the arbitrator, informed the parties that they were unable to make a decision on the matter on 07 November 2018 and after due consultation with his legal team, filed this application on 19 November 2018. He submits that he did not delay in filing this application. Besides, he had to garner and assemble all the evidence necessary for this application.

[28] I should state from the outset that, it is implicit in the respondent's averments that she agrees that the decision to relocate the children to South Africa and for them to attend a new school is a major decision as envisaged in the Deed of Settlement or court order. It is for that reason that she had to tell and ask the applicant for his decision or opinion regarding the relevant school. Again, on there being no agreement between them, the matter was referred (by both of them) to the arbitrators who regrettably were unable to make a decision thereon. Had they been able to render a decision, such decision would have been final and binding on both parties. That, of course, I must hasten to add, would not have ousted the all-embracing role of the court as the upper guardian of the minor children and whose role or function is ultimately to do that which is in the best interests of the children.

[29] In view of the impasse between the parties, this court is therefore enjoined to exercise its role and decide what is in the best interests of the

children in this case. In exercising this delicate function or role, the court has to have all the necessary facts and material before it. Generally or often, the matter

is referred to trial to hear evidence on the pertinent contentious issues. There are legion of such issues in this application.

[30] It has to be emphasised herein that whilst the respondent as the custodian parent has the right to choose for herself where she wants to live or stay, such right is by necessary implication and logic, subject to or restricted or restrained by a consideration, amongst others, of what is in the best interests of the children and the rights of access to such children by the applicant. In a word, her rights of residence are not without limit. They are not unbridled.

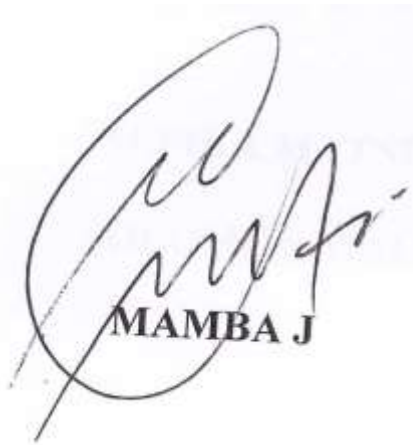
[31] It is unfortunate for both the children and their parents that this dispute has occurred at this time of the year, when decisive or concrete decisions have to be made for the new year regarding the welfare of the children. I have no doubt though that both parents have been motivated and have acted and are acting in pursuit of or by what they consider to be in the best interests of their children. They have acted and are acting out of parental love and affection. They are, however, unable to agree on this crucial issues of residence and schooling for the children in this case.

[32] I do not think that any useful purpose would be served in rushing a decision on such a sensitive and delicate matter. Evidence is required. The matter is referred to trial for the court to investigate amongst others,

the issue of the suitability of the respective intended residence arrangements for the children, the travel or transport arrangements that the respondent would put in place for the children in Johannesburg and the schooling at Waterstone College.

[33] For the foregoing reasons, the rule nisi is, pending finalisation of this application extended. In effect, this means that the respondent is interdicted and restrained from relocating the children to RSA and or enrolling them at any other school or educational establishment without the

express consent of the applicant. Costs of the application shall be costs in the cause.



For the Applicant : **Adv. M. Van der Walt**

For the Respondent: **Adv. P. E. Flynn**