

SOUTH AFRICA / JUDGMENT

G.W v M.H (2023/120036) [2024] ZAGPJHC 467 (17 May 2024)

[2024] ZAGPJHC 467

COURT

South Gauteng High Court, Johannesburg

BEFORE

C Todd

CASE / FILE NUMBER

2023/120036

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 2023-120036

1.

REPORTABLE:

2.

OF INTEREST TO OTHER
JUDGES:

3.

REVISED:

17

May 2024

In

the matter between:

G[...]
P[...]
W[...]
Applicant
and
M[...]
V[...] H[...]
Respondent
This judgment was
handed down electronically by circulation to the parties'
representatives via e-mail, by being uploaded
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deemed to be 10h00 on 17 May 2024.
Order: Para [25] of this
judgment

JUDGMENT

TODD, AJ:

- [1] The Applicant is the father of a minor child. The Respondent is the child's mother. The parties are unmarried and do not live together. The child is currently a little over two years old, and she resides with her mother.
- [2] After a period of some two years during which they were able to regulate their parental responsibilities and rights on a flexible and ad hoc basis through effective communication between them, a dispute has now arisen, and they have reached a stalemate. The key issue in dispute concerns the Respondent's stance that at present she does not agree that the Applicant's contact with the child should include overnight stays or sleepovers, something to which the Applicant insists that he is entitled.
- [3] The parties attempted mediation over several months last year, but this process ultimately broke down. Each party levels various accusations at the other about the reasons for the stalemate. The Respondent contends that the Applicant has failed to commit to providing what she considers to be appropriate financial support for the child. The Applicant disputes this, and contends that the Respondent's stance on overnight contact is an irrational and impermissible retaliation for his failure to agree to her demands for financial support for the child. The Respondent asserts that on previous occasions the child had been unsettled following sleepovers with the Applicant, and that while she agrees in principle that this should occur in due course she is only willing to reintroduce sleepover contact in the future when the child is ready for it.
- [4] Late last year, after mediation had failed, the parties agreed that they should appoint an expert to investigate and make recommendations regarding the exercise of their parental rights and responsibilities. They also agreed who that expert would be, a counselling

psychologist, Dr Duchen. However, ongoing disagreement about sleepover contact with the child in the interim, and a general deterioration in the tone and content of their engagement regarding the exercise of their parental responsibilities and rights more generally, resulted in the Applicant deciding to approach this Court seeking its intervention.

- [5] The Applicant has approached this Court seeking interim relief regulating the exercise of parental responsibilities and rights pending a main application in which he intends seeking an order that the child should ordinarily reside with him.
- [6] The exchange of pleadings has revealed that the parties are substantially in agreement on most aspects of parental contact in the interim. Both accept that some flexibility is a good thing, but the Applicant contends, and the Respondent now agrees, that in light of the breakdown in relations following the unsuccessful mediation last year an order of this Court that establishes clear responsibilities and rights would be appropriate.
- [7] The parties agree that both hold full parental responsibilities and rights in respect of the minor child and, as indicated, they have also agreed on the appointment of Dr Duchen to assist them by investigating, reporting and making recommendations regarding the exercise of those parental responsibilities and rights in the future.
- [8] They also agree that pending that process involving the expert, the child should continue to reside with the Respondent, and that the Applicant should continue to have significant and meaningful parental contact with the child. The only serious bone of contention regarding that contact is whether it should include sleepovers.
- [9] On this point the Applicant asserts that he is or should be entitled to have the minor child in his care overnight on a regular basis, and that this would be in the best interests of the child by helping to establish a full parenting relationship between the child and her father. The Respondent accepts that this should be so in principle, but asserts that at present, at the child's current age and in light of her observations when the child did sleep over with the Applicant on various occasions last year, this should only be reintroduced gradually in the future.
- [10] This topic will no doubt be carefully and properly considered by Dr Duchen. In the interim the Respondent is not prepared to agree to sleepovers, while the Applicant insists on them being included as part of the contact regime between the parties.
- [11] The parties agree that there is no onus in matters of this nature and that the court needs to decide on the strength of the evidence placed before it, having regard in particular to the best interests of the child in the manner envisaged by the Children's Act, whether or not sleepovers with her father are in the best interests of the child in these circumstances.

- [12] I have considered the authorities to which the parties referred me, including the helpful summary of the applicable legal principles and collection of authorities in *LB v LAE*[1]; and also in *ADB v BAK*[2]. In short, the best interests of the child are paramount, the Court must take into account the considerations set out in section 7 of the Children's Act, and the Court should adopt a child-centred, balanced approach informed by constitutional values and sensitive towards culture and religion.
- [13] I have also considered the available evidence, which consists primarily of the assertions of the Applicant in the founding papers regarding the pattern of prior contact including sleepovers and the circumstances in which the Respondent has changed her stance on this, and those of the Respondent regarding her reasons for not consenting to sleepovers at the present stage. There is no report or other evidence before me of an expert nature.
- [14] As indicated earlier, the Applicant contends that the Respondent's stance is a form of retaliation arising from their failure to agree on the financial support reasonably necessary for the child, and he points to the fact that the Respondent had not previously raised concern about the child's well-being after sleepovers in the past. As a result, he contends that those concerns are not genuine and should be disregarded by the Court in assessing what is in the best interests of the child.
- [15] I have carefully considered these contentions. I accept that bonds with both parents are important for young children, and that where parents of a minor child live separately the child has the right and the parents the responsibility to ensure that contact is maintained.[3] This means that the parent with whom the child ordinarily lives should do everything reasonably possible to facilitate regular contact with the other parent.[4]
- [16] The Respondent accepts this, as she must, and also accepts that in principle this should include regular overnight contact. She has, however, raised concerns about the impact on the child based on her personal observations of past experience. It is so that the Respondent should not be the sole arbiter of what is in the best interests of the child. On the other hand, it also seems clear to me that moving regularly between two homes could potentially be disruptive and adverse to the best interests of a young child. I am not persuaded that the concerns that the Respondent has raised in the papers are not genuine or that they can be disregarded by this Court.
- [17] In the circumstances I am unable, on the evidence before me, to reach the conclusion that it is in fact in the best interests of the child to have sleepover contact with the Applicant at this point in time, before the parties have received the benefit of the expert advice and assistance of their chosen psychologist on this question. It would indeed be difficult for this Court to reach firm conclusions without the benefit of evidence presented by a suitably qualified professional on questions such as whether and when overnight contact should be resumed, how often and for how long, during the week or on weekends, all with a keen focus on what is in the best interests of the child as opposed to the stated preference or interests of one or other parent.

- [18] The Applicant has suggested that both Dr Duchon and the Office of the Family Advocate should investigate (in the case of the latter “if necessary”) and report, but it seems to me unnecessary to direct the involvement of the Family Advocate at this stage. The first step is for the psychologist agreed between the parties to investigate and provide a report on the best interests of the child as regards her primary care and contact. If the parties are still unable to agree, following that report, and one or other chooses to approach this Court for further order, the intervention or assistance of the Office of the Family Advocate would certainly appear appropriate at that stage.
- [19] I have been invited to direct that the psychologist’s work should be undertaken urgently. But of course the quality of her investigation and related advice and recommendations should not be imperiled. The possibility of a delay of some months before this occurs does not in my view change the balance of the assessment that I am able to make at present regarding the interests of the child, and I am reluctant to make an order that would impose timeframes on the expert that might not be realistic for her, without hearing her or considering her stance on this. I agree, however, that this should occur as expeditiously as reasonably possible.
- [20] On behalf of the Respondent it was submitted that the approach to Court by way of this application was unnecessary. But she does agree, litigation having commenced, that it would benefit all concerned to have an order made creating certainty regarding the contact regime in the interim, including the various matters dealt with in the respective draft orders that each party has recommended to the court.
- [21] It is certainly regrettable that the parties have found themselves unable to reach agreement on these things. They have many years of co-parenting ahead of them during which, I have little doubt, it would be in the best interests of the child if her parents are able to conduct their arrangements in a consensual manner and are not in conflict about them. Courts repeatedly point out, in cases of this nature, that “the welfare of a child is, undoubtedly, best served by being raised in a happy and secure atmosphere”[5], that an acrimonious relationship between parents invariably has an adverse impact on a child, and that “children of parents who are not prepared to conduct themselves reasonably often suffer the consequences of that conduct”[6]. The sharply deteriorated tone of the parties’ interactions at the end of last year, including that reflected in emails and

correspondence to the Respondent from the Applicant’s attorneys at the end of September and in early October 2023, is of a kind unlikely either to generate consensus or to nurture the mutual respect between parents that is most likely to contribute to the child’s continued well-being.

- [22] In any event, I am satisfied that an order should now be made, and I do so in the terms set out below. Since I do not intend to include sleepovers in the contact regime sought, I have largely adopted the draft put up by the Respondent to which, but for the question of sleepover contact, I do not understand the Applicant to have raised objection.

[23] On the question of costs, it has frequently been stated by this Court in matters of this kind that there are “no winners”, and that the burden of costs should be shared. On the other hand, this is a matter in which the Applicant has asked the Court to establish a contact regime that includes overnight contact before this has been considered or recommended by an expert, and to that extent the application is pre-emptive. It seems to me fair and reasonable that the Respondent should bear a part of the Applicant’s costs.

[24] In the circumstances, I make the order below.

Order

[25] Pending further order in these proceedings:

1. The parties shall remain co-holders of full parental responsibilities and rights in respect of the minor child (hereafter referred to as “G[...]”), in terms of Section 18 of the Children’s Act, No 38 of 2005 (“The Act”);
2. Dr Ronel Duchen (“Dr Duchen”) is appointed to conduct an investigation and furnish a report with her recommendations as to the exercise of the parties’ parental rights and responsibilities towards G[...]. Dr Duchen is directed to take these steps as expeditiously as reasonably possible and appropriate in the circumstances;
3. The costs associated with Dr Duchen’s appointment will be paid for by the Applicant;
4. Pending the report and recommendations of Dr Duchen and any subsequent agreement between the parties or further order of this Court, G[...] shall reside with the Respondent. The Applicant shall exercise rights of contact with G[...] as follows:
 - 4.1 Weekday contact every Tuesday and Thursday from 16h00 to 19h00;
 - 4.2 Weekend contact on alternating Saturdays and Sundays from 10h00 to 17h00.
5. In addition to what is set out in paragraph 4 above:
 - 5.1 Both parties shall be entitled to exercise daily reasonable telephonic or videocall contact with G[...] whilst she is in the other party’s care;
 - 5.2 Both parties shall be entitled to exercise reasonable contact with G[...] on her birthday;
 - 5.3 Both parties shall be entitled to have G[...] spend the day with them on their respective birthdays, irrespective of whose care she is supposed to be in on that particular day, in the case of the Applicant between 10h00 and 17h00;
 - 5.4 The Applicant shall be entitled to have G[...] spend Father’s Day with him, between 10h00 and 17h00, and the Respondent shall be entitled to have G[...] spend Mother’s Day with her, irrespective of whose care G[...] would otherwise be in at the time;
 - 5.5 The parties will alternate public holidays. The Applicant will exercise contact on his public holidays from 10h00 until 17h00;

5.6 In respect of Christmas and New Year, both parties shall be entitled to spend time with G[...] for half the day on Christmas and New Year's Day;

5.7 Easter Sunday is to alternate annually between the parties;

5.8 The parties may agree to any other contact not specifically provided for in this order.

6. The parties are granted leave to supplement their papers upon receipt of the report of Dr Duchon.

7. The Applicant is ordered to pay 50% of the Respondent's costs of this application incurred to date, on the party and party scale B.

C TODD

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing: 08 MAY 2024

Date of

Judgment:

17 MAY 2024

APPEARANCES

Counsel for the Appellant: B Manning

Instructed by:

Fullard Mayer Morrison Inc.

Counsel for the Respondents: M Courtenay

Instructed by:

Clarks Attorneys

[1] [2023] ZAGPPHC 1915 at paras [19] to [34]

[2] 2023 JDR 2627 (KZP) at paras [6] and [7]

[3] LW v DB 2020

(1) SA 169 (GJ) para 20

[4] Hinds v Hinds [2016] ZAKZPHC 92 para 72

[5] F v F 2006 (3) SA 42 (SCA) at para [11]

[6] ADB v BAK supra at [28]

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