

SOUTH AFRICA / JUDGMENT

K v K (22/8285) [2022]

ZAGPJHC 147 (14 March 2022)

[2022] ZAGPJHC 147

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

22/8285

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IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 22/8285

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

14/3/2022

In

the matter between:

K[...],

P[...]

(ID

No:

[...])

Applicant

and

K[...],

T[...] I[...] (born S[...])

(ID

No: [....])
Respondent

JUDGMENT

MOORCROFT AJ:

Order

[1] In this urgent application heard on 8 March 2022 I granted the following order on 9 March 2020:

“1. The respondent is directed to disclose the physical address where the minor children S[....] D[....] S[....] K[....] and S[....] N[....] S[....] K[....] reside, and any future or alternative temporary or permanent physical address, to the applicant.

2. The Family Advocate is requested to forthwith proceed with an investigation and report, and the parties shall, together with the minor children, attend at the Office of the Family Advocate for the scheduled appointment on 4 May 2022 at 09h00.

3. Pendente lite the children’s care and contact with the applicant and the respondent shall be as follows:

3.1. The children shall spend alternate weeks with the applicant and respondent, commencing with the applicant collecting the children from school on Monday, 14 March 2022 and returning them to school on Monday, 21 March 2022 from where they will return home with the respondent, to be collected by the applicant again the following Monday, and so on.

3.2. It shall be the responsibility of the parent in whose care the children are to ensure that they attend school.

3.3. If the children are for any reason not attending school, the parent in whose care the children are at the time shall immediately inform the other parent of the reason and of the precise whereabouts of the children or the child in question.

4. Each party shall have daily electronic or telephonic contact with the children at 18h00 on each day that the children are in the other party’s care.

5. The applicant shall have the children for the second half of the March/April 2022 school holiday period.

6. The applicant shall have the children for the first half of the July/August 2022 school holiday period.

7. The applicant shall have the children for the second half of the September/October 2022 school holiday period.

8. The applicant shall have the children for the second half of the December 2022/January 2023 school holiday period.
9. The parties are given leave to file supplementary affidavits upon receipt of the Family Advocate's report and recommendations.
10. Each party shall pay his or her own costs.

Introduction

- [2] The parties are married and are the parents of 4-year old twins born in 2018. The respondent also has a child from a previous relationship who lives in Kwazulu-Natal.
- [3] The marriage relationship floundered in October 2021 and the respondent left the matrimonial home on 18 February 2022. Divorce proceedings are pending.
- [4] The parties signed two settlement agreements in November 2021 and February 2022 that provided for shared residence of the children in November 2021 and February 2022 but these are now the subject of a dispute on the ground that they were allegedly signed under duress.

The children's residential address

- [5] The respondent refused to disclose her and the children's residential address to the applicant and the applicant is uncertain as to their whereabouts. He also alleges and it is not disputed that the children do not attend preschool regularly.
- [6] The respondent previously suggested shared residence in WhatsApp messages and a handwritten note attached to the papers. It would appear that shared residence was not a contentious issue until February 2022. Contrary to the correspondence and the WhatsApp messages, it is alleged in the plea also filed in February 2022, that the applicant was abusive towards the minor children.
- [7] The disputes as to the validity of the settlement agreements and the permanent residence of the minor children are matters to be dealt with in the divorce action. The allegations of abuse and duress do not go into great detail and relate to the relationship between the parties rather than the applicant's relationship with the minor children.
- [8] The respondent launched domestic violence proceedings on an ex parte basis and these proceedings have not been finalised. The allegations relate to the alleged conduct of the applicant towards the respondent rather than towards the minor children.
- [9] In February 2022 the respondent's attorney offered access to the minor children under supervised contact by her nanny on condition that primary residence remain with the respondent but subsequently the respondent informed the applicant that the nanny was not prepared to fulfil this role because she was traumatised by abuse that she had seen and endured. These allegations are denied by the applicant.

- [10] Section 22 of the Children's Act, 38 of 2005, provides for a parental responsibilities and rights agreements and section 35 of the Act makes it an offence to act contrary to an order of Court or to a parental responsibilities and rights agreement.
- [11] The applicant relies on the section but it is not applicable. In the absence of extraordinary circumstances requiring the place of residence to be withheld from a parent, the parent of a child is entitled to know their whereabouts. I will therefore make such an order under the common law rather than under the Act.

Shared residence

- [12] It appears from the affidavits that shared residence was common cause when the Whatsapp messages referred to above were written. I am satisfied that pendente lite shared residence is the best interests of the children.
- [13] The shared residence arrangements in the disputed settlement agreements are convoluted and complex and the order I have made in this regard is intended to simplify the shared residence arrangements to avoid disputes and the unnecessary constant dislocation of the minor children who need certainty and consistency.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 14 March 2022

COUNSEL FOR THE APPLICANT: Ms M Feinstein

INSTRUCTED BY:

Clarks Attorneys

COUNSEL FOR RESPONDENT: Mr Mafu

INSTRUCTED BY:

Bongani Dyani Attorneys

DATE OF HEARING:

8 March 2022

DATE OF ORDER:

9 March 2022

DATE OF JUDGMENT:

14 March 2022

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