

SOUTH AFRICA / JUDGMENT

M v N (2021/22911) [2022] ZAGPJHC 882 (10 November 2022)

[2022] ZAGPJHC 882

COURT

South Gauteng High Court, Johannesburg

BEFORE

Engelbrecht

CASE / FILE NUMBER

2021/22911

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 2021/22911

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

In

the matter between:

M

[....] 1, M [....] 2 V [....] Z [....]

Applicant

And

M[....]

3 C [....] N [....]

Respondent

JUDGMENT

ENGELBRECHT AJ

INTRODUCTION**AND BACKGROUND**

1. This is an application in terms of uniform rule 43 (URC 43), in which the applicant seeks an order, pending finalization of divorce proceedings, that:
 - 1.1. the parties shall co-hold full parental responsibilities and rights (PR&R) in respect of a minor child born of the marriage;
 - 1.2. the minor child shall reside primarily with the respondent;
 - 1.3. the parties shall have daily telephone contact with the minor child when she is residing with the other party at identified times;
 - 1.4. both parties shall have the right to attend any school function, parents' evening or any activities in which the minor child participates;
 - 1.5. the applicant shall be entitled to exercise contact with the minor child (i) from after school every Wednesday afternoon until the following morning when she shall be returned to school; and (ii) every alternate weekend, together with contact on alternate public holidays, contact on Father's day, contact on the applicant's birthday, and shared contact during school holidays and contact on alternating Easter weekends;
 - 1.6. decision regarding the minor child's schooling, extramural activities, healthcare, medical procedures and treatment, as well as her religious, cultural and social upbringing shall be made jointly by the parties;
 - 1.7. in the event that either party is unable to care for the minor child for 24 hours or longer, when she is due to be in their care, then the other party shall be offered first right of refusal during that period;
 - 1.8. a social worker or attorney shall be appointed as the parenting coordinator to assist the parties to mediate their disputes, monitor and regulate their contact and provide parental guidance for the parties that will serve the minor child's best interests, with powers as set out in an annexure to the notice of motion;
 - 1.9. for costs.
2. The relief concerning care for and contact with the child is consistent with the recommendations of a social worker, Ms Leonie Henig (Ms Henig), who conducted an extensive investigation prior to her production of a report containing these recommendations (the Report).

3. Ms Goosen, for the respondent, indicated to the court that the respondent agrees with the orders sought in paragraphs 1.1, 1.2, 1.3, 1.4 and 1.7 above. In essence, the issue before this court is the nature and extent of the contact to be enjoyed by the applicant, and the conditions that must attach to such contact.
4. The applicant and the respondent appear to agree that, although the minor child loves the applicant, the relationship between the applicant and the minor child is not good. This is borne out by the Report. The applicant asserts by reference to the Report that this is due to the acts of alienation by the respondent; the respondent blames the lack of relationship between the minor child and the applicant on the latter's long absences from the minor's child's life and his failure to reach out to her and be responsive to her need to be cared for, as well as certain cultural practices of the applicant's family that the respondent asserts to upset and unsettle the minor child, and make her fearful. Whatever the reason, it appears to be common cause that the applicant wants to re-build a relationship with the minor child in circumstances where that relationship is not as it should be.
5. The respondent further asserts that she is not opposed to contact between the applicant and the minor child; merely that she wishes to ensure that the appropriate mechanisms are put in place to ensure that the relationship is restored over time, before the minor child is exposed to a care and contact regime that would require of her to stay with the applicant while she is unwilling to do so. Indeed, it appears from the papers before me that the minor child has expressed an unwillingness to attend contact sessions with the applicant, and the evidence is that the minor child, albeit only 11 years old, is strong-willed. The respondent is also opposed to contact sessions in the presence of members of the extended family, given the fears and insecurities allegedly experienced by the minor child in consequence of the cultural practices of the extended family. This is a major sticking-point, because the applicant is quadruplegic and he relies on the care of members of his extended family, including a nephew who is also his carer and driver.
6. What the respondent proposes, in addition to submission to certain relief sought (as already identified), is that:
 - 6.1. Angie English, alternatively in the event of her being unavailable, another suitably qualified psychologist agreed upon between the parties, be appointed to undertake therapy with the minor child to address her issues with the applicant;
 - 6.2. Tanya Kriel, alternatively in the event of her being unavailable, another suitably qualified social worker at Kidsbuzz, be appointed to conduct reconstructive therapy between the applicant and the minor child;
 - 6.3. the applicant be entitled to exercise contact with the minor child under the supervision of the social worker conducting the reconstructive therapy who shall make recommendations on the extent and duration of the contact between the applicant and the minor child, after taking into account the views of the psychologist attending to the therapy with the minor child;

6.4. the applicant be entitled to reasonable telephonic and/or electronic contact with the minor child at all reasonable times, subject to her religious, cultural, scholastic, sporting, extra mural and social activities;

6.5. in addition to the reconstructive therapy contact sessions, applicant be entitled to additional contact with the minor child at times agreed upon with respondent at a mutually agreed upon venue, in respondent's presence, only in the event of the minor child consenting thereto on each occasion, and only if the minor child's psychologist and reconstructive therapy social worker advise that same is appropriate;

6.6. pendente lite, applicant not be entitled to exercise physical contact with the minor child in the presence of his extended family;

6.7. the applicant pay the costs of this application.

7. In other words, the respondent's position, crisply, is that contact should initially be exercised alone under the supervision of a social worker who shall conduct reconstructive therapy with the applicant and the minor child to slowly re-integrate him into her life until they have established a bond where unsupervised contact can be exercised; and that the social worker manages ongoing recommendations of what contact should take place.

MATTERS IN DISPUTE

8. The dispute therefore boils down to:

8.1. the nature and extent of the contact to be exercised by the applicant with the minor child;

8.2. whether such contact ought to be supervised pending reconstructive therapy;

8.3. whether the extended family of the applicant ought to be allowed to be present during contact between the applicant and the minor child;

8.4. the necessity or otherwise for the appointment of a parenting coordinator;

8.5. the necessity or otherwise of reconstructive therapy;

8.6. in relation to the appointments sought by the respondent, the identity of the relevant professionals and the responsibility for the costs of such appointment; and

8.7. costs.

THIS COURT'S ROLE

9. A court, as the upper guardian of minors, is empowered and under a duty to consider and evaluate all relevant factors placed before it, in order to decide the issue that is of paramount importance: the best interests of the child.[1] After all, section 9 of the Children's Act[2] makes plain that in all matters concerning the care of a child the standard that the child's best interest is of paramount

importance, “must be applied”.

10. The court has extreme wide powers in establishing what is in the best interests of a child, and it is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties.[3] As upper guardian of minor children, this court enjoys the authority to establish what is in the best interest of a child and to make corresponding order to ensure that such interests are effectively served and safeguarded.[4] The interests of the minor child ought not to be held to ransom for the sake of legal niceties. [5]

11. Overall, this court must be guided by the provisions of sections 6 and 7 of the Children’s Act.

11.1. In accordance with section 6(2 all decisions in a matter concerning a child must inter alia:

11.1.1.respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights, the bests interests of the child standard set out in section 7 and the rights and principles set out in the Children’s Act, subject to any lawful limitation;

11.1.2.respect the child’s inherent dignity; and

11.1.3.treat the child fairly and equitably.

11.2. Section 6(4)(b) provides that a delay in action or decision to be taken must be avoided as far as possible.

11.3. Section 6(5) prescribes that a child, having regard to his or her age, maturity and stage of development, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

11.4. Section 7 provides that, where the standard of the best interests of the child is to be applied, the following factors inter alia must be taken into account:

11.4.1.the nature of the personal relationship between the child and the parents, or any specific parent;

11.4.2.the capacity of the parents, or any specific parent, to provide for the needs of the child, including emotional and intellectual needs;

11.4.3.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;

11.4.4.the need for the child to remain in the care of his or her parent, family and extended family and to maintain a connection with his or her family, extended family, culture or tradition;

11.4.5.relevant characteristics of the child;

11.4.6.the child’s emotional security; and

11.4.7. which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

12. Moreover, in accordance with section 10 of the Children's Act, "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration".
13. In accordance with this standard, the views of the child must be given "due consideration". That said, the best interests of the child are paramount in the determination. This suggests that the views of the child, whilst taken into account in an appropriate manner, may be overridden by what the court considers to be in the best interests of the child as evaluated by reference to the considerations in section 7 of the Children's Act.
14. In this regard, I take note of the approach of the court in *Germani v Herf*,^[6] a case in which the court was concerned with a situation where a father was, despite an order of court granting access rights, refused access over a protracted period of time. In that case, the 12-year old child steadfastly refused to have anything to do with the father. The court considered that the "child's recalcitrance has undoubtedly been encouraged by the negative attitude (the mother) has constantly adopted towards (the father's right to access)".^[7] It held that "No doubt the attitude of a child ought to be taken into account in appropriate circumstances ... here the child, ... is still young, immature in mind, impressionable and, notwithstanding his stubbornness, unable to decide for himself what is in his best interests. ... Moreover to attach such decisive importance to the child's own professed intractable attitude as the learned Judge has done means that the child is thereby allowed to frustrate access orders ... granted by the Court as being in his best interests. That surely cannot be right."^[8]
15. Of interest is also the approach of the Australian High Court of Justice, Family Division in *V v V*:^[9]

"The wishes and feelings of the children are significant in respect of their age and maturity. These children wish to stay with their mother with whom they have always lived. Their wishes must be taken into account, but cannot be determinative of the outcome, partly because of their young age, and also because they have become enmeshed in the parents' problems and have learnt to say what they think is expected of them. In order to survive emotionally I find these children ... have become skilled in reiterating the view of their principal carer to date, namely the mother, and in consequence that their views are tainted by the influence of the mother."^[10]

THE VOICE OF THE CHILD AND THE CHILD'S BEST INTERESTS IN THE PRESENT CASE

16. In the present case, the voice of the child is reflected in the Report, which also provides context in respect of the attitude of the child.

17. In the Report, Ms Henig found that respondent had engaged in parental alienating behaviours which has resulted in the child having become alienated from the applicant. She based such finding on considerations such as that:
- 17.1. the respondent has allegedly withheld contact from the applicant and has not facilitated his communication with the child;
- 17.2. the respondent has allegedly badmouthed the applicant and has shared inappropriate adult information about the applicant with the minor child;
- 17.3. the child shows no signs of any guilt or remorse when she badmouthed the applicant or when she spoke to him in an obnoxious, rude and disrespectful manner;
- 17.4. the child allegedly has frivolous or absurd rationalisations for rejecting the applicant; and
- 17.5. the respondent has allegedly poisoned the child against the applicant's family.
18. The respondent denies these allegations. She says that it is the applicant himself that failed to establish a relationship with the child in that he (i) only resided with her for approximately four of the eleven years since her birth, (ii) has not attempted to contact the child regularly and has in fact made extremely infrequent telephonic and physical contact with her; (iii) has chosen not to exercise his parental responsibilities throughout her life; and (iv) failed to take steps to overcome issues between him and the minor child when she rejected him, and rather withdrew when his attempts at contact were unsuccessful, given his unassertive nature.
19. Leaving aside for the moment the reasons for the fraught relationship between the applicant and the minor child, it is noted that the Report records that the child:
- 19.1. made numerous references to her anger at her father;
- 19.2. complained that the applicant maintained his nephew and others, but "does not give her anything", that he does not sufficiently contribute to her financially and that it hurt her on her 10th birthday when he did not give her a present, as well as when she asked him something for school he said "ask your mother, she works";
- 19.3. complained that the applicant always chooses other people over her and claimed that he does not care about her, but only for others;
- 19.4. made it very clear that she did not want to engage or interact with her father, and she was rude, dismissive and obnoxious towards him;
- 19.5. launched a verbal attack on the applicant during the interview, accusing him of ruining her life, always leaving her and the respondent, and choosing other people over them;

19.6. stated that she hates her father, that she does not want to see him, and that he must leave her alone and go to another woman he had been in a relationship with and his nephew as she has to move on with her life.

20. What is evident from these records is that the child appears to be extremely bitter, angry, frustrated and resentful towards the applicant for him having to reside with another family instead of with her. She feels that he abandoned her and that he cares more for others than her. She was hurt and miserable when he left, and she has lost her trust in him to remain a constant in her life.
21. Having regard to the Report and the allegations set out in the papers exchanged in this application, this court will accept that the respondent has a very close relationship with the child and that she has contributed in a significant way to the alienation between the applicant and the minor child. But the blame cannot be put on her shoulders alone, as the Report would suggest. The conduct of the applicant himself has surely contributed to the child's resentment of her father, and his absences, his failure

to communicate with the child on a regular basis and his withdrawal when met with resistance to contact with him cannot be ignored as possible reasons for the child harbouring anger towards him. At the very least, the applicant's conduct provided fertile ground for the respondent's alienating conduct.

22. I will accept Ms Henig's conclusion that the child's complaints about the applicant are, in some respects frivolous and unreasonable, but this does not make the child's experience less real. As an 11-year old she can be expected potentially to have unrealistic expectations, and if the respondent has indeed fuelled her feelings of resentment, all the more so. Whatever the reasons for resentment, and irrespective of whether they are rational or underpinned by frivolous reasoning, the reality that

confronts this court is that there is a real need that the minor child should be given assistance to re-build her relationship with her father. Imposing a regime of contact upon her when she is not ready to engage with the applicant in the manner proposed will most likely lead to yet further resentment. At the same time, the contact regime, and any assistance that is provided to the child, must not operate to postpone the development of a real and meaningful relationship between the applicant and the child.

23. I also have regard to the approach of the court in *K v K*:^[11]

"... I have borne in mind that L is not yet ten years old. In addition, I have no doubt that her attitude to the respondent has been influenced by the applicant's attitude to the respondent. If I should order the applicant to co-operate in insuring that the respondent is able to exercise her rights of access, as I intend to do, I have no doubt that this will in itself contribute in a change in L's attitude to the respondent. What is required of the applicant to 'co-operate fully' is that should L refuse to speak to the respondent or to go to the respondent or in any manner not allow the respondent to exercise his rights of access as defined in the order I give, that the applicant will then use his parental authority and usual parental disciplinary techniques in order to compel L to submit to the respondent's access".^[12]

24. The order that I propose to make is one that will allow for the development of the relationship, but which does not delay the development of the relationship unduly as a result of extremely restrictive conditions attaching to the care of and contact with the minor child. I also consider as appropriate the approach adopted in *K v K*, which would place certain obligations on the respondent in respect of the promotion of the relationship between the applicant and the minor child.
25. The question that remains, then, is what assistance is required to achieve the desired outcomes. This brings the court to a consideration of the positions adopted by the respective parties. Helpfully, counsel for the applicant and the respondent each provided a draft order. In the assessment of this court, there are elements of each of the proposed orders that can be employed to reach an outcome that is just and equitable, in the best interests of the minor child, and that takes into account the voice of the child to a reasonable degree. I highlight once more that the court has wide powers and that I am not bound by the relief that has been sought or proposed by the parties, respectively.
26. I shall briefly discuss some considerations brought into account.

ASSISTANCE TO BE PROVIDED TO THE PARTIES

The issue of the appointment of a parenting coordinator or other professionals

27. The judgment in *TC v SC*[13] sets out the requirements for a court to appoint a parenting coordinator without the consent of both parties, which requirement includes that there already be an agreed parenting plan in existence, which plan has been made an order of court. The role of such a parenting co-ordinator must be limited to supervising the implementation of and compliance with the court order, and directives of a parenting coordinator remain subject to judicial oversight. The parenting coordinator can do no more than to make ancillary rulings that are necessary to implement the court order.
28. These requirements have not been met in the present instance. But this fact alone cannot stand in the way of attempts to be made to improve the situation that currently prevails. Clearly, there is a need for the intervention of third parties to assist and guide the parties and the minor child. The respondent accepts this by way of
the counter-proposal made.
29. The counter-proposal envisages a situation where the professionals proposed to be appointed will treat and assist the minor child in order to secure the benefits of fostering a better relationship between the applicant and the minor child whilst the minor child remains in essence under the exclusive care of the respondent. There is no accounting for the influence that the respondent may continue to exert over the minor child and which may undermine the efforts of the professionals engaged to assist the minor child. This is an issue that must be addressed.

30. Moreover, the counter-proposal envisages that no extended family member of the applicant be present during the applicant's contact with the minor child, which is impractical given the applicant's position as a quadriplegic who requires the assistance of his family.
31. This court must strike a balance between the proposals made, in order to come to a sensible solution. Whatever balance is struck, there is no doubt that there is the need for the appointment of professionals to assist. The applicant is a man of some means. He, in the interests of fostering the relationship with his child, should bear the costs of the interventions at this stage. I consider as fair the proposal made by the applicant that such costs be borne by him for now, but that the respondent remains liable for half the cost, which will be made good at the time of the division of the joint estate. I propose to make an order in that regard.
32. Moreover, I accept the proposals of the respondent in respect of the appointment of therapists to conduct psychological and reconstructive therapy. However, the process must be managed, and I intend to order also that the reconstruction therapist attend to the role of case manager, as reflected in the order.

The nature of the contact and whether it ought to be supervised

33. This court recognises the need to assist the minor child in

re-establishing a relationship with the applicant, and for the involvement of a psychologist and reconstructive therapist in this

endeavour, as indicated above. The court recognises that contact with the applicant ought to be limited to a degree at the outset, so that the child is given the necessary assistance. That said, the minor child must gradually be introduced to contact with the applicant on an un-supervised basis to allow for the development of a natural and healthy relationship between them. As soon as is possible, the situation must be one of more normal contact. In order to avoid a further approach to court, I intend to set timelines to regulate to a degree the nature of future contact. I also put in place measures to ensure that the applicant and respondent cooperate and to ensure that the influence of the respondent does not undermine the endeavours of the reconstructive therapy.

34. I decline to restrict contact of the minor child with the extended family of the applicant. For the moment, I consider that mid-week contact would be disruptive during the school term, especially given the fact that the child resides in Johannesburg and the applicant resides in Pretoria. The travel arrangements in ordinary circumstances would be complicated, and are even more so given the applicant's reliance on the assistance of others to transport the minor child in circumstances where he cannot do so himself. Any number of complications may arise in light of the minor child's school activities after hours as well.

COSTS

35. In circumstances where this court has struck a balance between the respective positions of the parties, I make an order that each party shall bear their own costs in relation to this application.

ORDER

36. In the circumstances I make the following order:

1. Pendente lite the parties shall continue to co-hold full parental responsibilities and rights in respect of the minor child, Z [...] 1 S [...] P [...] M [...] 1 , a daughter born on 11 February 2011, as set out in Section 18 of the Children's Act 38 of 2005.
2. The minor child shall reside primarily with the respondent.
3. Decisions regarding the minor child's schooling, extramural activities, healthcare, medical procedures and treatment, as well as her religious, cultural and social upbringing shall be made jointly by the parties.
4. Both parties shall have the right to attend any school function, parents' evening or any activities in which the minor child participates.
5. Angie English, alternatively in the event of her being unavailable, another suitably qualified psychologist agreed upon between the parties or further alternatively in the absence of such agreement, a suitably qualified psychologist identified by the office of the Family Advocate shall be appointed to undertake individual therapy with the minor child concerning her relationship with the applicant and the respondent for a minimum period of three months.
6. Tanya Kriel, alternatively in the event of her being unavailable, another suitably qualified social worker at Kidsbuzz, is appointed to conduct reconstructive therapy between the applicant and the minor child, such reconstructive therapy to be conducted for an hour a week for a minimum period of three months.
 - 6.1. The appointments for such reconstructive therapy shall be made by the applicant in consultation with the appointed social worker, and having due regard to the commitments of the minor child that affect her availability at particular times.
 - 6.2. The respondent shall be notified twenty-four hours in advance of, and make the minor child available for, each session.
 - 6.3. The applicant shall collect the minor child from the respondent or school for such sessions and return the minor child to either school or the respondent thereafter.
7. The social worker appointed as the reconstructive therapist shall further be appointed as case manager to monitor the reconstruction of the relationship between the minor child and the applicant and to ensure that both parents promote the other as a good parent.

8. The applicant and the respondent are to attend parental guidance sessions for a minimum period of three months. If the parties cannot within 20 calendar days of the date of this order agree on the therapist to be appointed for this purpose, the Family Advocate shall appoint the therapist.
9. The parties shall be liable for the costs of therapy as aforesaid in equal shares, subject to the applicant making payment of such costs as and when incurred and a pecuniary adjustment in regard thereto being made in his favour on division of the joint estate between the parties.
10. The applicant shall be entitled to exercise contact to the minor child as follows:
 - 10.1. In respect of November 2022:
 - 10.1.1. On Saturday, 19 November 2022 or Sunday, 20 November 2022 from 11h30 until 14h30;
 - 10.2. In respect of December 2022:
 - 10.2.1. On Saturday, 3 December 2022 or Sunday, 4 December 2022 from 11h30 to 14h30;
 - 10.2.2. On Thursday, 22 December 2022 from 09h00 to 12h00;
 - 10.2.3. From 11h30 to 16h00 on Sunday, 1 January 2023;
 - 10.3. In respect of January 2023:
 - 10.3.1. On Thursday, 5 January 2023 from 10h00 to 15h00;
 - 10.3.2. From after school on Friday, 13 January 2023 until 15h00 on Sunday, 15 January 2023;
11. As from February 2023, the applicant will be entitled to have the minor child with him:
 - 11.1. every alternate weekend from after school on a Friday until Sunday afternoon at 17h00.
 - 11.2. every alternate public holiday that does not fall into the school holidays of the minor child from after school the day before such holiday if a school day alternatively from 17h00 if a non-school day, until 17h00 on the day of such public holiday;
 - 11.3. every Father's Day from 17h00 the day before such day until 17h00 on Father's Day (the respondent shall be entitled to the same contact with the minor child on Mother's Day);
 - 11.4. half of the minor child's available time on her birthday;
 - 11.5. the applicant's birthday from the night before until 17h00 on the day of such birthday (the respondent shall be entitled to the same contact with the minor child on her birthday);
 - 11.6. half of all school holidays and mid-term breaks wherein the first and second half of the holidays will be alternated between the parties;
 - 11.7. every alternate Easter weekend;
 - 11.8. all Jewish religious holidays, from 14h00 the night before until 19h00 the following evening.

12. The parties shall have daily telephone contact with the minor child when she is residing with the other party, which contact shall take place between 18h00 and 19h00, but subject to the minor child's social, cultural, religious or extra-mural activities (it being the responsibility of the party with whom the minor child is resident at the time to facilitate such telecommunication contact).

13. There is no order as to costs.

M ENGELBRECHT

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Date of hearing : 04 November 2022

Date of judgment : 09 November 2022

Appearances:

Attorneys for the applicant : STEVE MERCHAK ATTORNEYS

Counsel for the applicant : DS HODGE

Attorneys for the respondent : CRAIG BAILLE ATTORNEYS

Counsel for the respondent : C GORDON

[1] J v J 2008

(6) SA 30 (C).

[2] 38 of 2005.

[3] Terblanche v Terblanche 1992

(1) SA 501 (W) at 504C.

[4] Girdwood v Girdwood 1995

(4) SA 698 (C).

[5] AD and DD v DW and Others (2008) 4 BCR 359 at 370A.

[6] 1975

(4) SA 887 (A).

[7] At 900A.

[8] At 899D.

[9] [2004] EWHC 1215 (Fam).

[10] At para 44.

[11] (17189/08)

[2009] ZAGPJHC 13 (6 May 2009).

[12] At para 30.

[13] 2018

(4) SA 530 (WCC) para 71.

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