

SOUTH AFRICA / JUDGMENT

M.D.P v W.T.P and Another (Appeal) (A139/2024) [2025] ZAWCHC 300 (17 July 2025) [2025] ZAWCHC 300

COURT

Western Cape High Court, Cape Town

BEFORE

Ndita, Savage, Mangcu-Lockwood

CASE / FILE NUMBER

A139/2024

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE, CAPE TOWN)

Case

no: A139/2024

In

the matter between:

M[...]
D[...] P[...]
Appellant
and
W[...]
T[...] P[...]
First
Respondent
P[...]:
W[...] T[...]
(as
father and guardian of
the

minor child C[...] P[...]
Second
Respondent

Heard: 22 January 2025
(final submissions filed by the parties on 5 May 2025)

Delivered: 17 July 2025

Coram: Ndita, Savage and
Mangcu-Lockwood JJ

JUDGMENT

THE COURT

Introduction

- [1] This appeal, with the leave of the Supreme Court of Appeal (SCA), is against the order of Van Zyl AJ made on 2 May 2023 in terms of which the primary residence of the parties' minor son (the child) born on 26 April 2020 was shared between them, with a detailed contact regime ordered.
- [2] The appellant, M[...] P[...], appeals against the order seeking its variation to provide for the child to be primarily resident with her, subject to a different contact regime granted in favour of the respondent, W[...] P[...]. The respondent opposes the appeal on the basis that no appeal lies against the order which was of an interim nature; the court exercised its wide discretion properly and judicially and came to a well-reasoned decision which serves the best interest of the child; the court did not misdirect itself in relation to the facts, the law or the application of the law to the facts; and

even if the merits were to be considered afresh on appeal, the appeal falls to be dismissed.

Relevant

background

- [3] The parties were married on 26 October 2017 and at the time of their separation they were resident in Knysna in the Western Cape. The appellant, a geneticist who obtained a PhD in 2016, owned the farm in Knysna on which they resided from October 2018.
- [4] On 21 September 2021 the appellant left the matrimonial home with the child and moved to live in a flatlet on a neighbouring farm. Following their separation, the respondent, a qualified engineer who

worked from home, planned his work schedule around his contact with the child in Knysna. Most days he would see the child for lunch and then again at bath-time, with weekend sleep-over contact limited to one night per week given the appellant's concerns about the impact this had on the child.

[5] The relationship between the parties at the time was marked by high levels of conflict. On 26 October 2021 the respondent was served with an interim protection order, which the appellant subsequently withdrew. In that application the appellant accused the respondent of domestic violence. The respondent opposed the matter and vehemently

denied the allegations. In opposing that matter he stated that the appellant had sustained a head injury in a motor vehicle accident in 2006 for which she was paid out a "significant sum" by the Road Accident Fund. Consequent to this injury, he claimed that the appellant experienced episodes of anger and violence, sometimes acted irrationally, and took medication, which she later stopped taking, and worked with psychologist to address her anger issues. A neuropsychological assessment put up by the appellant found that she had no neurocognitive difficulties, nor that she was unable to take good care of the child.

[6] The parties were assisted on 14 December 2021 by an educational psychologist to reach an agreement on interim care and contact arrangements. The respondent had contact with the child on Tuesdays and alternating Saturdays and Sundays from 08h00 to 17h00 and from 16h30 on Thursdays until 08h00 on Fridays. At this time the appellant moved back to the farm in Knysna when from 1 December 2021 the respondent moved to a cottage on a farm in the Knysna vicinity.

[7] A follow up meeting with the educational psychologist was scheduled for 15 February 2022. However, on 21 January 2022, without informing the respondent or obtaining his consent, nor obtaining the consent of the Court, the appellant took the unilateral decision to relocate with the child to Monzi in KwaZulu-Natal where her family reside. The respondent only learnt of the relocation on 27 January 2022. The effect of the child's relocation was that the appellant abandoned the agreement reached in December 2021 and the respondent was unable to exercise contact with the child on the basis agreed.

[8] In response to the appellant's unilateral relocation on 31 January 2022 the respondent instituted urgent proceedings in the Western Cape High Court seeking in Part A of such application that the appellant be directed to return the child to Knysna within 24 hours and that care and interim contact be granted to him on specified days in the week and over holidays. He sought that a social worker be appointed in conjunction with the Family Advocate to undertake an investigation into the matter and make recommendations to the Court as to the care, contact and residency of the child. In Part B of his application the respondent sought an order regulating his contact with the child until the child was 3 years of age and

then for the period after he turned 3, following expert recommendations having been obtained.

[9] The appellant opposed the application on 3 February 2022. In doing so she accepted that the respondent had bonded with the child, with whom he had a close relationship, but stated that she remained the primary caregiver and the child's primary attachment figure, with the child still being breastfed and sleeping in her bed. She accepted however that regular contact between the child and the respondent must be maintained for the emotional and developmental needs of the child to be met. In her counter-application the appellant sought an order that as primary caregiver she be permitted to relocate to Monzi and remain in KwaZulu-Natal with the child; the respondent's contact with the child be determined once the reports by the relevant experts had been filed; and that a child psychologist be appointed to report to the Court on care and contact arrangements in respect of the child. The appellant proposed in the interim that contact be granted to the respondent one weekend a month, on alternative public holidays and that daily video contact with the child be permitted, with the respondent to bear responsibility for any travel costs.

[10] On 1 February 2022, prior to her opposing the respondent's urgent application, the appellant instituted a divorce action in the Kwazulu-Natal High Court against the respondent. The divorce action is opposed by the respondent and remains pending.

[11] On 7 February 2022 Van Zyl AJ issued a rule nisi in terms of which it was ordered that good cause be shown why the child's primary place of residence should not be shared between the parties, with the child to spend eleven consecutive nights with the respondent from 26 April 2024 and then fourteen consecutive nights from 26 October 2024

at the respondent's residence in the Western Cape. In addition the parties were ordered to appoint a child psychologist or social worker to investigate, with the Family Advocate, and report to the Court on care and contact arrangements in respect of the child. The child's primary caregiver remained in the interim the appellant, who was permitted to reside with the child in Monzi in KwaZulu-Natal subject to the respondent's rights of reasonable contact. This contact included one weekend a month, alternative public holidays, with holiday periods shared and daily video contact. Travel costs were ordered to be paid by the respondent on an interim basis.

[12] In response, the respondent sought direct access to the Constitutional Court for leave to appeal the interim order. That application was refused.

[13] Assessments regarding what care and contact arrangements were in the best interests of the child were undertaken by Dr Karen Spurrier, a social worker in private practice appointed by the respondent, and Mr Anthony Townsend, a clinical psychologist appointed by the appellant. In addition, the Family Counsellor from the Family Advocate's

office interviewed the parties and collateral sources.

[14] The Family Counsellor reported on 10 May 2022 that the child's primary attachment was to the appellant and that the relationship between the parties was not conducive to co-parenting given the high levels of hostility and acrimony between them and their inability to communicate. It was recommended that the appellant be permitted to remain in Kwazulu-

Natal, subject to the respondent having reasonable contact every alternate weekend, with the child to travel to Knysna every alternate weekend, daily telephone or video contact, birthday, Christmas and new year contact shared every alternate year. It was proposed that school holiday contact be regulated by way of a parenting plan once the child started formal schooling.

- [15] Dr Spurrier proposed in her report dated 31 March 2022 that a move towards a 50/50 parenting plan when the child reached 3 years of age would be in the child's best interests, but that while the Court had permitted the appellant to remain in KwaZulu-Natal as a temporary measure, this would not work as a long-term solution without further intervention. She found it unrealistic to require the respondent to relocate to KwaZulu-Natal and proposed that a move by the appellant to George in the Western Cape would be more in line with the concept of parallel parenting and would allow the appellant access to an airport to visit her family in KwaZulu-Natal.
- [16] Mr Townsend in his report dated 5 September 2022 found the child's primary attachment figure to be the appellant and expressed the view that a shared residence arrangement should be phased in to allow the child to spend equal amounts of time, up to a week at a time, with each parent. He proposed that for this purpose the parties should take up residence in a "neutral" city where both parties would be able to live and work, such as Pretoria or Stellenbosch

where both had previously lived and worked, which would allow the child access to his maternal and paternal extended family members.

Neither Dr Spurrier nor Mr Townsend recommended that the parties share primary residence of the child in two different provinces, with the child moving back and forth between them.

- [17] On 2 May 2023 Van Zyl AJ discharged the rule nisi issued on 7 February 2022 and ordered that the child's primary place of residence should be shared between the parties and that with effect from 26 April 2024, until the child attained the age of 4½ years, that he spend eleven consecutive nights each month with the respondent at his residence in the Western Cape and fourteen consecutive nights from 26 October 2024. Van Zyl AJ dismissed the application for leave to appeal against this order on the basis that it was not appealable under section 16(3) of the Superior Court Act 10 of

2013. On petition the SCA granted leave to appeal the order to this Court.

- [18] The appellant has since her relocation continued to reside with the child in KwaZulu-Natal and the respondent has since relocated to Hermanus in the Western Cape from where he travels to his work at Stellenbosch University.
- [19] In the reasons subsequently given for the order made on 2 May 2023, Van AJ noted that the marriage relationship between the parties was tumultuous and that their current relationship remains strained and acrimonious. Extensive and serious accusations were found to have been levelled by each party against the other in relation to their marital

relationship and conduct. It was noted that the parties appear to be unable to communicate with each other, but share the child to whom they are both devoted. Noting section 7 of the Children's Act 38 of 2005 and the best interests of the child standard, the Court found that from the papers and the expert reports filed, it was apparent that both parents "are more than capable

parents".

[20] The Court noted that the respondent was not opposed to the child remaining in Monzi provided that he had equal time with the child. The appellant, who the Court found relied heavily on the fact that she was still breastfeeding the child, was unwilling to agree to a shared residency and sought that the respondent move closer to Kwazulu-Natal where shared care could be phased in with the assistance of a child psychologist.

[21] Mr Townsend, the Court noted, had been appointed by the appellant to report to the Court because she considered Dr Spurrier to be biased. In spite of this, the appellant did not accept Mr Townsend's report, which also recommended that the parties relocate to minimise the logistical difficulties and expense of ensuring the respondent's

contact with the child. The Court recognised Mr Townsend's concern regarding the appellant's anger towards the respondent.

This included her threat more than once that the respondent "will not see [the child] if they divorce and if she does not get her way"; that she could perhaps find someone else and give the child a better model of a father; that "I don't know if we can be equal co-parents as there is more to [the child] than his relationship with his father". The Court noted that this led Mr Townsend to state that the appellant "appears to be opposed to the [respondent] spending more time with his son, even though she has indicated that she regards him as being a good father". The appellant was found by Mr Townsend to have given the impression that she did not view contact between the child and the respondent as important, but rather as an inconvenience to her. Mr Townsend expressed concern that "the current care and contact arrangement is financially unsustainable for both parents and extensive travel (both by plane and by car) of several hours is required for visits. This must be adjusted as it is lengthy and expensive".

[22] As far as relocation and residency was concerned, the Court found that the appellant had relocated with the child without consulting the respondent about her plans and that this had impacted on the child's contact with the respondent. In spite of this, the Court accepted that the move was beneficial to the appellant in that she was more settled, employed, surrounded by a loving family structure and that this was beneficial to the child. The Court was not persuaded that forcing a move by the parties would necessarily result in a better outcome for the child and that to order such a move may cause even more resentment. The Court therefore found that the parties can share care and contact with the child even though they do not live close to each other, with a 50/50 shared residency arrangement to be phased in. This, it was found, would minimise travel expenses and provide to homes for the child, as recommended by the experts. It was ordered that a parenting coordinator be appointed to

resolve any logistical difficulties which arose.

Appealability of order

[23] The first issue that arises is this matter relates to the respondent's contention that, in spite of leave to appeal having been granted on petition, the order of the Court a quo is not appealable.

[24] Van Zyl AJ refused leave to appeal on the basis that the order made was not appealable under section 16(3) of the Superior Courts Act, 2013[1] in that it was susceptible to variation by the Court hearing the divorce action. This was so in that the order granted was aimed at providing for the residency and contact with the child on an interim basis, pending the conclusion of the divorce action and that as such, it is pendente lite and was therefore not appealable.

[25] Section 16(3) provides that:

‘...no appeal lies from any judgment or order in proceedings in connection with an application –
...(c) for the interim custody of a child when a matrimonial action between his or her parents is pending or about to be instituted;

(d) by one parent against the other for interim access to a child where a matrimonial action between the parents is pending or about to be instituted.’

[26] The respondent contends that the order made concerns interim care and contact and that given the provisions of section 16(3), it is not appealable. However, since leave to appeal has been granted by the SCA in this matter, this Court is constrained by that decision and it is not open to us to revisit the issue. This is so in that by overturning Van Zyl AJ's order to the effect that the matter was not appealable, the SCA has effectively dealt with the issue of appealability.

Van Zyl AJ order

[27] On 2 May 2023 Van Zyl AJ ordered that:

1. The rule nisi issued on 7 February 2022 and thereafter extended is discharged;
2. The parties remain co-holders of parental responsibilities and rights to, including guardianship of, the minor child;
3. The child's primary residency shall be shared between the parties, to be phased in, with the scheduling of contact and residency to be undertaken in conjunction with a parenting coordinator, if necessary.
4. From 2 May 2023 until 25 October 2023:

4.1 the child will be in the care of the appellant, with the respondent to exercise contact with the child one weekend a month from Thursdays at 16h00 until Mondays at 12h00;

4.2 this contact be exercise at the respondent's home in Hermanus, Western Cape;

4.3 the appellant or a third party agreed upon between the parties will fly from Kwazulu-Natal to Cape Town with the child;

4.4 the respondent will collect the child from Cape Town airport, alternatively at a place agreed, in conjunction with the parenting coordinator if necessary;

4.5 the appellant will make the necessary travel arrangements to Cape Town, including purchasing airline flights, rental car arrangements and accommodation;

4.6 the costs of travel will be shared by the parties.

5. From 26 October 2023 until 25 April 2024:

5.1 the child will be in the care of the appellant, with the respondent to exercise contact with the child two weekends per month from Thursdays at 16h00 until Mondays at 12h00;

5.2 this contact be exercise at the respondent's home in Hermanus, Western Cape;

5.3 the parties are to be responsible, on an alternating basis, to make the necessary travel arrangements;

5.4 the party responsible for such travel arrangements will be liable to pay all such travel expenses, with the appellant to be liable for travel expenses from Monzi to King Shaka Airport;

5.5 the appellant or a third party agreed will accompany the child from Kwazulu-Natal to Cape Town airport;

5.6 the respondent will collect the child from Cape Town airport, alternatively at a place agreed, in conjunction with the parenting coordinator if necessary;

6. From 26 April 2024 until 25 October 2024:

6.1 the child will spend 11 nights with the respondent from Thursday at 16h00 until Monday at 12h00 of the following week;

6.2 contact will be exercised the respondent's place of residence in Hermanus, in the Western Cape;

6.3 the appellant will take the child on Monday at 16h00 until Tuesday at 09h00, when the child will be returned to the respondent's care and on Friday at 16h00 until Saturday at 09h00 when the appellant will return the child to the respondent's care;

6.4 thereafter the contact in 6,1 will continue uninterruptedly;

6.5 The travel arrangements will alternate as follows:

6.5.1 for the first 11-day period the appellant will travel from King Shaka airport to Cape Town with the child, where the child will be handed over to the respondent;

6.5.2 the appellant will be liable to pay for the plane tickets associated with this travel, with all other travel expenses to be paid by the party incurring such expense;

6.4.3 from the second 11-day period onwards, the respondent or a third party nominated by him and agreed between the parties, will fly from Cape Town to King Shaka Airport to collect the child on Thursdays at 16h00, with the respondent liable for the costs of airline tickets and other travel expenses;

6.3.4 the appellant, or third party nominated by her and agreed between the parties, will fly from King Shaka to Cape Town to collect the child from the respondent on Mondays at 12h00, with the respondent liable for airline tickets and any other travel expenses.

7. From 26 October 2024 onwards:

7.1 the child's residency will be shared between the parties, with the month divided with the child to spend 14 nights with the respondent commencing on a Thursday at 16h00 until the second Thursday thereafter at 16h00;

7.2 the respondent or a third party nominated by him and agreed between the parties will fly from Cape Town to King Shaka airport to collect the child on Thursdays at 16h00, with the respondent liable for all travel costs;

7.3 the appellant or a third party nominated by her and agreed between the parties will fly from King Shaka airport to Cape Town to collect the child on Thursdays at 16h00, with the respondent liable for all travel costs, with the appellant liable for all travel costs;

8. Each parent will be give right of first refusal if the other parent is unable to be with the child for a period of longer than 48 hours. If the other parent is not available, a suitable adult who is known and familiar to both parents can be arranged to care for the child;

9. The child's birthday will rotate between the parties, as agreed by them or recommended by the parenting coordinator;

10. The child will spend Mothers' and Fathers' day, and each parent's birthday with the appellant or respondent respectively, if practical and logistically possible.

11. Each parent will provide the other with details concerning planned holidays;

12. The child will have daily video contact with the parent he is not with for 30 minutes on any particular day and should be wish to contact the other parent at any other time, he may do so;

13. The appellant will ensure that wifi/internet connection is installed at her residence in Monzi within one month of the order and properly maintain it to ensure that the respondent is able to contact the child in Monzi;

14. Contact with extended family is restricted to when the child in is the care of the relevant parent;

15. The child will not be left unsupervised in the care of his maternal grandfather given his diagnosis with Parkinson's disease;
16. Each party will make decisions regarding the child's day to day care and control while in the child is in the care of that parent;
17. Bothy parties shall have joint-decision making powers regarding the child's religion, major medical interventions, education and extra-mural activities;
18. When the child reaches school-going age, the parties in conjunction with the parenting coordinator will appoint an independent psychologist agreed between them to conduct an investigation to determine the child's best interests in relation to the new stage of life;
19. All school holidays will be shared between the parties so that the child spends equal time with the parties during each holiday. The scheduling of the holidays will be undertaken in conjunction with the parenting coordinator, if necessary, and be arranged to rotate Christmas, New Year and Easter annually between the parties;
20. The parties shall have independent relationships with the child's schools, doctors, dentists and other professionals with whom the child has relationships or interactions;
21. The parties may be present at school functions, meetings, concerts and activities;
22. All contact provided will not interfere with the child's educational activities and attendance at school from the commencement of Grade R;
23. In the event that the parties cannot agree on the child's schooling or any issue relating to his residency at that stage, the parenting coordinator will mediate the dispute between the parties, with either party entitled to approach the Court for relief;
24. The parenting coordinator appointed, Dr Astrid Martalas, will be retained to assist the parties with communication and issues which require negotiation, mediation or decision-making such as regarding contact, medical care and education of the child, with the parenting coordinator authorises to make directives binding on the parties until a Court orders otherwise on identified issues. The parents are responsible for the costs of the parenting coordinator;
25. The parents will commence, where applicable, and continue with individual therapy and endeavour to ensure that their respective interpersonal difficulties with each other are managed effectively to ensure that the child's best interests are upheld;
26. The child will receive play therapy, if necessary, from a counselling psychologist agreed upon between the parties, with the assistance of the parenting coordinator, the costs of which are to be borne by the parties equally;

27. The parenting coordinator and the parties are entitled to feedback reports from the child's counselling psychologist to obtain insight into the child's emotional and psychological position and development;
28. The costs of the services of the parenting coordinator shall be shared between the parties equally;
29. Each party is to pay his or her own costs of the application and the counter-application.

Grounds of appeal

[28] The appellant appeals against the order inter alia that:

1. the child's primary residency be shared between the parties, with this order to be phased in with a parenting coordinator, if necessary;
2. contact arrangements ordered first until 25 October 2024;
3. contact arrangements ordered from 26 October 2024 onwards, including the rotation of the child's birthday
4. an investigation by an independent psychologist once the child reaches school-going age, to determine the child's best interests, with mediation by the parenting co-ordinator or if the parties cannot agree on the child's schooling or any issue relating to his residency at that stage;
5. each party pay their own costs.

[29] The appellant seeks that the order of Van Zyl AJ be varied to provide that the child's primary place of residence is with the appellant in KwaZulu-Natal, with the respondent to have contact with the child every alternate weekend, alternating between the Western Cape and Kwazulu-Natal from Friday afternoon to Monday morning.

[30] The appellant seeks that it be ordered that when the respondent has contact with the child in Kwazulu-Natal, he book accommodation within or close to the area in which the child resides and the costs of the accommodation be shared by the parties; that the respondent be responsible for the costs of his travel from the Western Cape to Kwazulu-Natal; that the appellant provide the respondent with the use of a motor vehicle from when he arrives at the airport on Friday afternoon until he returns to the airport on Monday morning; that the respondent collect the child from school on Friday afternoon and return him to school on Monday morning. When the respondent has contact with the child in the Western Cape the appellant proposed that she will pay her own return travel costs from Kwazulu-Natal to the Western Cape; that the parties share equally the child's

travel costs and the appellant's accommodation costs in the Western Cape.

[31] The appellant seeks that it be ordered that Christmas and New Year contact alternate between the parties annually, with contact on Fathers' Day be ordered from 09h00 to 17h00 and Mothers' Day contact from 08h00 to 13h00; and birthday contact to be shared. Each party should be entitled to daily video contact with the child if he is not in their care between 17h30 and 20h00. In addition, June and December school holidays contact be alternated every seven days from the age of 5 until the child is 7, every ten days until the age of 9, every 14 days until the age of 11 and thereafter half of every holiday; and that the April and September school holidays be shared.

Updated circumstances

[32] As was made clear in *Terblanche v Terblanche*,^[2] as upper guardian in custody and related matters the High Court has wide powers to establish what is in the best interests of minor children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the

respective parties. It may have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes. This requires that account be taken of relevant factors and circumstances, both past and future, and the possibility of what might happen in the future when making an order.^[3]

[33] For this reason, following the hearing of this appeal, and given that almost two years had elapsed since the order of Van Zyl AJ was made, this Court requested that updated expert reports be filed by Mr Townsend and Dr Spurrier so as to obtain insight into the current relevant circumstances of the child and the parties. Following receipt of these updated reports, on 10 April 2025, a joint minute of the experts was requested.

[34] In the joint minute filed it was agreed by the experts that:

1. the child has emotionally bonded with both of his parents and he desires and would benefit from more time with his father;
2. his paternal relationship is significant to him and should be further developed to deepen his bond with his father in the child's best interests and the child shows no discomfort expressing his needs to his father;
3. support by the appellant for the relationship between the respondent and the child is not optimal;
4. both parents report and demonstrate significant difficulties with effective coparenting in the best interest of the child and intervention in this area is crucial;

5. both parents present with generally intact parenting ability, although each demonstrates some vulnerabilities. There appears to be a mild degree of enmeshment between the appellant and the child which may lead to emotional confusion and potential difficulty for the child if unaddressed and is attended to;
6. a curator ad litem be appointed until litigation is complete in the child's best interests and once the litigation is finalised a parenting coordinator should be appointed to protect the child's best interests;
7. a roughly 60/40 split in care and contact should be ordered. During periods within the school term, it is recommended that the respondent travel to Kwazulu-Natal and the child be in his care. During school holiday periods, the child should travel to the respondent for two thirds of the holiday period;
8. the child should be referred for play therapy;
9. the parents should have the right of first refusal to look after the child is one is away, with early notification of planned trips crucial.

[35] A proposed contact schedule proposed by Dr Spurrier was attached to the minute.

Parties' responses to joint minute

[36] The Court provided both parties with the opportunity to comment on the contents of the joint minute by 5 May 2025. From the responses received, it is apparent that the parties agree that it is unnecessary and undesirable for a curator ad litem to be appointed in that expert reports have detailed the relevant issues in the best interest of the child, who is now 5 years old. The parties agree however that a parenting co-ordinator should be appointed. Detailed responses were received to the logistics of the contact arrangements involving the child which indicate no agreement between the parties in this regard.

Discussion

[37] When dealing with matters involving the minor children and their best interests, the court must acquire an overall impression and bring a fair mind to all of the relevant facts and circumstances which are relevant to its determination. All information obtained must be assessed in a balanced manner in deciding what is in the best interests of the child.[4] The paramountcy of the best interests of the child, protected by the Constitution,[5] must ultimately inform the decision of the court in a child-centred approach.[6]

[38] Our courts have noted the impact that divorce and separation has on children which can be serious and risks causing lifelong consequences for children. This is more so where parents display negative behaviours as part of a power struggle which is often played out in disputes concerning their children. Parenting can be a challenging endeavour, even for the most constructive and functional of parents. The different contributions that each parent bring to the life of a child are very often invaluable to the growth and development of that child. In families in which deep disputes have taken hold, the child

is placed in between warring factions, expected with limited life experience to manage the challenges of how to avoid or try to

overcome disputes from flaring up. This is an invidious position in which to place a young child, yet disputing parents very often appear to be immune to the realities of this or its impact.

[39] The Court a quo considered the expert reports, all of the relevant circumstances of the parties and those of the child, the child's rights, needs and development when adjudicating the application. As indicated, given the lapse of time between the order of Van Zyl AJ and the hearing of the appeal, updated experts reports were sought to allow this Court to be placed in a position to consider the best interest of the child.

[40] In *Coopers (South Africa)*[7] it was recognised by the Appellate Division that the opinion of an expert represents a –

‘reasoned conclusion based on facts or data, which are either common cause, or established [on] evidence, or that of some other competent witness. Except possibly where it is not controverted, and expert's bold statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premise from which the reasoning proceeds, are disclosed by the expert.’[8]

[41] In *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* [9] the SCA noted that in the evaluation of expert evidence the court must –

‘determine whether and to what extent their opinions advanced are founded on logical reasoning and be satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached a defensible conclusion.’

[42] If an expert opinion overlooks an obvious risk which could have been guarded against it will not be reasonable, even if almost universally

held; and an expert opinion that is not capable of withstanding logical analysis cannot be reasonable. While it will seldom be right to conclude that views genuinely held by a competent expert are unreasonable, at the same time it would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide the benchmark required.[10]

[43] Having had regard to the relevant facts and circumstances before us in this matter, we consider it appropriate to note at the outset our view that much of the difficulty which has arisen in this matter is a direct consequence of the Court a quo not having ordered that the appellant return with the child to the Western Cape when faced with the urgent application of the respondent that she do so. The appellant acted unilaterally and without regard to the rights of both the respondent and the child when, without having obtained the consent of the respondent or the Court, she moved with the child to the opposite side of the country. While her move was motivated by the fact that her family resides there and her relationship

with the respondent had broken down, it cannot be overlooked that this unilateral step occurred in circumstances in which the appellant was aware that this would place enormous difficulties on the respondent being able to maintain regular and meaningful contact with the child and that it would have a direct impact on the child. The appellant's criticisms of the respondent and her suggestions that his role as father could be replaced, which she reported to Mr Townsend, bear out her blatant disregard for the seriousness of her conduct and its consequences for both the child and the respondent.

[44] In this appeal the appellant seeks that the order of shared residence imposed by Van Zyl AJ on the recommendation of the experts be varied to provide that the child reside primarily with her. Having regard to the views of the experts and the relevant facts and circumstances of this matter, we are not persuaded that such a variation of the order

is warranted at this time. The opinions advanced by the experts appear to us to have been founded on logical reasoning and to have been made on a logical basis, with the comparative risks and benefits assessed in order to reach a defensible conclusion in the manner required by the Court in Michael.

[45] Despite the fact that the child has not as yet been enrolled in grade 1, the years of deeply acrimonious litigation in which the parties have engaged for the past three years have had the result that the child has not been in a position to spend meaningful periods of time with the respondent in order to develop a strong and healthy relationship with him as is father. This has had, most importantly, deeply negative consequences for the child who has not been placed in a position to develop a strong and healthy relationship with his father. As much is evident from the fact that when asked to draw a picture of his immediate family members, this does not include the respondent.

[46] We accept the finding of the experts that the child has emotionally bonded with both of his parents. We note that the child desires and would benefit from more time with his respondent and that he expresses no discomfort in expressing his needs to the respondent. The paternal relationship is a significant one both to the respondent and the child and it must be allowed to develop further so as to deepen the child's bond with the respondent. This is clearly, and urgently, in the child's best interests.

[47] We accept further the view of the experts that the appellant's support for the relationship between the respondent and the child is not optimal and that both parents report and demonstrate significant difficulties with effective coparenting in the best interest of the child. We also accept the shared opinion of the experts that both parents present with generally intact parenting ability, although each demonstrates some vulnerabilities, as well as their assessment that there appears to be a mild degree of enmeshment between the appellant and the child which may lead to emotional confusion and potential difficulty for the child if unaddressed.

[48] We do not however accept the recommendation of the experts that in the child's best interests a curator ad litem be appointed until litigation is complete. The decision whether to have a curator appointed is one to be made by a court and the view of the

experts on such a matter is, we believe, no more than a recommendation. We are cognisant of the fact that the recommendation made by experts arises given the unique circumstances of this matter. Whilst the appointment of a curator ad litem may in due course be an appropriate step forward to ensure that the child's best interests are properly protected in the face of deeply antagonistic

and unconstructive parental relationships and behaviours, we consider such a step to be premature and unnecessary at the current time.

[49] What is clear to us is however is that a parenting coordinator should be appointed to protect the child's best interests without delay. We do not consider it appropriate for such appointment to be made only once litigation is finalised, as is proposed by the

experts. This is so given the risk that such a date may arrive only in years to come and when the continued antagonism between the parties in this matter remains evident.

[50] We accept the recommendation of the experts on a proper and careful assessment of the relevant facts and circumstances of the matter that a roughly 60/40 split in care and contact should be ordered, although we recognise that a perfectly calculated dissection of days to achieve this proportion is difficult and impracticable in the longer term given the child's schooling needs. We accept however the appellant's contention that the 14 nights shared residency arrangement ordered by Van Zyl AJ is unworkable for a number of reasons. These include the cost and logistical difficulty of moving the child across the country twice a month, the disruption that this will impose on his attendance at pre-primary and then primary school

and the negative impact that this will have on forging consistent relationships with peers and teachers whilst he is ferried around the country between his parents. For this reason, we take the view that the order of the Court a quo must be varied to distinguish between school terms and holiday periods. During periods within the school term, we consider it appropriate that the child remain primarily resident and in the care of the appellant, with the respondent granted reasonable contact to the child. During school holidays we consider it appropriate for the opposite arrangement to apply, with the child primarily to remain in the care of the respondent with the appellant granted reasonable contact with the child. Such an order gives effect to the recommendation of the experts that residence be shared on a 60/40 basis. We do not accept the recommendation of the Family Advocate's office that school holiday contact be regulated by way of a parenting plan put in place only once the child has started formal schooling. Given what has transpired in the matter, we are not satisfied that such a recommendation is in the child's best interests.

- [51] We find that the difficult and convoluted shared residency arrangement which was put in place by Van Zyl AJ is patently not in the best interests of the child. Instead we find that the child's residency with the respondent during school holidays will provide the respondent with the substantial periods of time which the experts agree must be provided to him, during which he will be in a position to strengthen his bond with the child in the respondent's own home environment. As stated, this is clearly in the child's best interests.
- [52] In addition, we accept the recommendation of the experts that the child be referred to play therapy. We take the view that this must be with immediate effect given the consequences of the parental conflicts to which the child has been exposed so as to ensure that his mental, social and psychological wellbeing is secured in his best interests. There is no reason why the cost of such therapy should not be borne by both parties.
- [53] We find no reason to warrant imposing a cost order against either party in this matter. Although the appeal is upheld and the order of Van Zyl AJ varied, the underlying facts and circumstances of the matter do not justify the imposition of a costs order against any one party, more so given the conduct of the parties and the ongoing litigation in which they are engaged.

Order

[54] For these reasons the following order is made:

1. The appeal is upheld with no order as to costs.
2. The order of Van Zyl AJ is set aside and substituted as follows:
 - '1. The child is to be primarily resident and in the care of the appellant, during all school terms and primarily resident and in the care of with the respondent during all school holidays periods.
 2. During the periods of primary residence with the appellant or the respondent as set out above, the parent with whom the child is not residing is entitled to exercise contact with the child every alternate weekend from 16h00 on a Friday until 08h00 on a Monday in the province in which the child is residing at the time.
 3. The parties are to bear all travel costs of the child equally and will be responsible for all of their own travel and accommodation costs.
 4. The parties will each have the right of first refusal to look after the child when the other is away during any period in which the child is resident and in the care of the other parent.
 5. The parent with whom the child is not residing on his birthday will be entitled to have contact with the child on the day of his birthday for a period of no less than four hours.

6. The parent with whom the child is not resident for the period from Christmas to new year, over the Easter weekend and during all other long weekend holidays, will exercise care and contact with the child during each Christmas to new year, Easter and other long weekend holidays every alternate year.
7. The child will have reasonable daily video contact with the parent in whose care he is not for a period of 30 minutes a day, provided that should the child wish to contact such parent at any other time, he may do so.
8. Both parties shall jointly make decisions concerning the child's education, religion, medical treatment and extra-mural activities.
9. The parties are entitled to establish independent relationships with the child's schools, doctors, dentists and other professionals with whom the child has relationships or interaction.
10. The parties may both be present at school functions, meetings, concerts and other such activities.
11. A parenting coordinator is to be appointed with immediate effect to assist the parties in their parenting of the child and in the mediation of disputes between them, with the parents jointly to bear the costs of such parenting coordinator.
12. The parents are at their own cost and with immediate effect to commence, or continue with, individual psychological therapy with a counselling psychologist to endeavour to ensure that their respective interpersonal difficulties with each other are managed effectively through appropriate psychological intervention so as to advance the child's best interests.
13. The child will attend play therapy with immediate effect with a counselling psychologist or other appropriate professional agreed upon between the parties, with the costs of such therapy to be shared by the parties equally.
14. Each party is to pay their own costs.'

NDITA J

SAVAGE J

MANGCU-LOCKWOOD J

APPEARANCES:

For the appellant: E S Law

Instructed by BDE Attorneys

For the respondent: C van Schalkwyk

Instructed by Kern, Armstrong & Associates

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- [1] Act 10 of 2013.
- [2] Terblanche v Terblanche 1992(1) SA 501 (W).
- [3] See for example P v P and another 2002
- (6) SA 105 (N).
- [4] Cunningham v Pretorius [2008] ZAGPHC 258 (21 August 2008)
- [5] Section 28
- [6] S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC)
- [7] Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH 1976
- (3) SA 352 (A).
- [8] At 371A – H. See too Schneider v AA 2010
- (5) SA 203 (WCC)mat 211E – 212B; Price Waterhouse Coopers Inc and Others v National Co-operative Limited and Another [2015] 2 All SA 403 at para 99; AM and Another v MEC for Health, Western Cape 2021
- (3) SA 337 (SCA) at para 21.
- [9] Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2011
- (3) SA 1188(SCA) paras 37 – 40.
- [10] At para 39.
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