

SOUTH AFRICA / JUDGMENT

R.M.D v K.D (16995/22P) [2023] ZAKZPHC 2 (13 January 2023)

[2023] ZAKZPHC 2**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mossop

CASE / FILE NUMBER

16995/22P

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Source record**FLYNOTES:****PRIMARY RESIDENCE OF CHILD**

Family

– Children – Primary residence – Animosity and feuding between separated parents – Interests of child –

Daughter aged five and impressionable – In her best interests to traverse this period while being cared for by her mother.

IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case No: 16995/22P

In the matter between:

R[...] M[...]

D[...]

APPLICANT

and

K[...]

D[...]

RESPONDENT

ORDER

The following order is

granted:	1. The application of the applicant, R[...] M[...] D[...], is dismissed with costs. 2. The counter application of the respondent, K[...] M[...], is
granted on the following terms:	(a) The primary place of residence of the minor child, S[.] F[...] D[...] (the minor child) shall be with the respondent. (b) The applicant shall be granted reasonable access to, and contact with, the minor child. (c) The respondent is authorised to enrol the minor child at Atholton Primary School, Umhlanga from January 2023 as a full-time student; and (d) The applicant is directed to pay the costs of the counter application.

JUDGMENT

MOSSOP J:

- [1] This is an ex-tempore judgment.
- [2] This opposed urgent application is being heard on the last day of the recess period prior to the commencement of the new court year. The matter first came before me on Tuesday this week in the recess motion court when I was persuaded by counsel that it was so pressingly urgent that I should hear it without undue delay. Having agreed to hear the matter in rushed circumstances, and now having heard argument, it would be churlish not to deliver an ex-tempore judgment. If judgment is to be delayed, then the expedited hearing of the matter will have been wasted. Given the circumstances, this judgment may accordingly not be as thorough as it could be, and I hope that the reasoning behind the decision that I have come to is not obfuscated by the haste with which this judgment has been prepared and delivered. Having adopted this approach, however, I do not wish it to be understood that I agree that the matter is urgent, as I shall explain shortly.
- [3] The applicant seeks an order in the following terms:
- ‘(a) This matter be heard on an urgent basis, and the time limits and notice periods be dispensed with;

- (b) An order be granted to the effect that the primary Residence [sic] of the minor child, S[...] F[...] D[...], be with the Applicant, and the Respondent be granted all reasonable access and contact with the minor child;
- (c) The minor child is enrolled at and attends Hilltops Pre-Primary School in Hilton from January 2023 in Grade R on a full time basis;
- (d) Cost [sic] of the Application, if defended.'

[4] The respondent has delivered notice of a counter application in which she seeks the following relief:

'1. The matter is deemed urgent and the normal forms and service required by the Uniformed [sic] Rules of Court are dispensed with;

- 2. Primary residence of the minor c child S[.] F[...] D[...] be with the applicant, K[...] M[...];
- 3. The Respondent, R[...] M[...] D[...] be granted reasonable access and contact with the minor child;
- 4. The Respondent in the main application is authorised to enrol the minor child in Atholton Primary School, Umhlanga from January 2023 and on a full-time basis.
- 5. The Respondent be and is hereby ordered to pay the costs of this application.'

[5] While there is a counter application, to avoid confusion I shall throughout this judgment refer to the father of the minor child as the applicant and the mother as the respondent, irrespective of which application it is that I am referring to.

[6] From the nature of the relief claimed it is obvious that this is a dispute involving a minor child. Despite what I was told about the urgency of the matter, this is not a naturally urgent matter. The urgency is apparently that the minor child is required to start school next week and it is undecided at this juncture which school she should attend as the parties are unable to agree on this. The parties have known of the commencement of the school term for a long time. Through their seemingly endless feuding, they have created any urgency that may exist and in so doing have jumped the queue of cases awaiting adjudication and pressurised the court to deal with the matter in a fashion that suits them. But for the fact that the matter does involve a minor child, I would have struck the matter off the roll and allowed it to take its normal course through the rolls. However, it is now before me, and I will deal with it because it is in the best interests of the minor child that a decision regarding her future be taken given the inability of her parents to agree with each other.

[7] The Judgment of Solomon is a story from the Hebrew Bible in which Solomon heard a dispute between two women who both claimed to be the mother of a young child. Solomon proposed to the two women that the child be cut in two, with each woman to receive half of the child. The woman who falsely claimed the child as hers entirely approved of this proposal, while the biological mother of the child begged that the sword of Solomon's

soldier, which had been drawn in preparation for the child to be cleaved in two, be sheathed, and the child committed to the care of her rival. Solomon's proposal led to the true mother revealing herself and sacrificing her personal interests for the best interests of the child.

- [8] Regretfully, in this matter neither of the parties has demonstrated that they truly have the best interests of their minor child, S[...] F[...] D[...], a young girl born on 27 September 2017 (the minor child), at heart. Indeed, it appears likely that both would have embraced Solomon's proposal that the minor child be cut in two rather than yield to the other. The animosity between them that must have contributed to the destruction of their relationship has not abated following the failure of the relationship. Instead, it appears that it has intensified. They are both adults yet have not conducted themselves as adults would. They appear to have declared war on each other and disregarded what effect this has on the minor child.
- [9] The applicant is the natural father of the minor child. The respondent is her birth mother. The parties never married. They resided together for a period but no longer do so. When they lived together, they lived at Howick, KwaZulu-Natal. When they separated, which occurred when the minor child was 14 months old, the respondent moved to La Mercy on the north coast of this province, a substantial distance from Howick. The applicant remains in Howick. The applicant has a child from a previous relationship, as does the respondent.
- [10] Mr Temlett, who appears for the respondent, submitted this morning that the matter is not a difficult one to decide. I agree that the issues in dispute are not complex. Indeed, they are the type of decisions that parents of minor children throughout the length and breadth of this country make as a matter of course on a day-to-day basis. Unfortunately, the parties, both of whom profess to be guided by the best interests of the minor child, are unable to make these decisions. They require the court to make those decisions for them. In *P v P*,^[1] the court stated that:

'Determining what custody arrangement will serve the best interests of the children in any particular case involves the High Court making a value judgment based on its finding of facts in the exercise of its inherent jurisdiction as the upper guardian of minor children...'

- [11] The two issues that require resolving are:

- (a) Where should the minor child's primary place of residence be?
- (b) Where should the minor child go to school?

- [12] While two issues are mentioned above, there is, in truth, only a single issue, namely, where the minor child's primary place of residence should be. Given the fact that the applicant and the respondent live far apart, it is not feasible that the minor child should live with one parent but go to school in an area where the non-custodial parent resides. Thus, the answer to the first issue will determine the answer to the second issue.

[13] At the moment, the arrangement between the parties is that they share the care of the minor child with each other. The minor child spends one week with the applicant and then one week with the respondent. Last year, the applicant enrolled the minor child at Hilltops Pre-Primary School (Hilltops), a school in the area in which he resides. I shall have more to say about this shortly. The respondent, on the other hand, did not enrol the minor child in school last year but has started her on an online educational programme that can be accessed from her home. The respondent has since secured agreement in principle that the minor child will be accepted at Atholton Primary School in Umhlanga should she succeed with her counter application.

[14] Over the fractious history of the parties' relationship since they went their separate ways, the Office of the Family Advocate has performed two investigations and delivered two reports on the issue of who the primary care giver should be. There has been litigation between the parties but I do not intend going into that litigation in any great detail. A psychologist has also investigated the issue of the care of the minor child and has prepared a report. The Family Advocate in both reports prepared by that office recommended joint custody of the minor child. No guidance at all was accordingly provided as to which of the two parents should be the primary care giver. The psychologist instructed has not done much better. He has categorically stated that the decision is to be made by the court not by him. In stating this, the psychologist appears to have misunderstood what was asked of him. He was not asked to make the final decision: he was asked to make a recommendation. He did, however, conclude that the shared residency arrangement that currently prevails:

'... is likely to be detrimental to the child and I find no grounds on which to make such a recommendation.'

I shall revert to the psychologists report later in this judgment.

[15] While the parties appear incapable of agreeing on anything, they are, surprisingly, both in agreement that the phase of the minor child's life where she migrated between their respective homes on a weekly basis has come to an end. The minor child now needs a permanent home and must attend a school as close as possible to her home.

[16] Because of the shared custody of the minor child over a relatively protracted period, both parties have had the opportunity to strengthen their bonds with the minor child. They also both acquired experience in caring for the minor child. The reports of the Family Advocate thus indicate that the minor child is comfortable in both their company. The applicant and the respondent accordingly both have the necessary parenting skills.

[17] From the facts disclosed in the papers, it appears that the applicant may be in a stronger financial position than the respondent. He owns certain immovable property that he acquired from an inheritance. He also has his own house. The respondent does not own property, nor does she live in a house: she rents a flat with her mother. She has, however, rented at the same place for the last five years and is thus settled in her accommodation.

[18] The applicant claims, further, that he can structure his workday so that he is able to spend more time with the minor child. He claims that this puts him in an advantageous position because the respondent is a salaried employee and cannot make decisions on how to structure her working day. However, in her answering affidavit, the respondent rejects this and states that her position has changed, and she will be able to spend more time working from home, thus giving her more time with the minor child. Both the applicant and the respondent have employed domestic assistants to assist them with the running of their respective households.

[19] I indicated earlier that the parties have declared war on each other. This has revealed itself in the fact that the applicant discloses,

for a reason best known to himself, that the respondent's mother, the minor child's maternal grandmother, has been

convicted, twice, on charges of fraud. He declines to allow his daughter to be raised by her granny. This is what he states in this regard:

'Respondent's mother, whom [sic] is put forward as the role model and matriarchal figure is a convicted criminal (with more than one conviction at different times) for crimes that have an underlying necessity for dishonesty. This is the very same woman that the Respondent wants our minor child to spend most of her waking hours with, on a permanent basis, while she is at work, and deems this to be better suited to spending time with me. I am at a loss with regards to this stand-point, and do not wish for my child to be effectively raised by this women [sic], be taught (directly or indirectly by example) how to act in life, as there is clearly a complete lack of morals and ethics in such a household;'

[20] Not to be outdone, the respondent has put up indistinct photographs with her papers which she claims depicts traces of cannabis that she alleges the applicant uses. I confess that after scrutinising the photograph I am not able to see this.

[21] The parties seem willing to make any allegation that has the effect of casting the other in a bad light. It is difficult to understand how they believe that this is in the best interests of the minor child.

[22] I do, however, acknowledge that the issues of care and contact are emotive subjects that rarely fail to provoke conflicting emotions. In addressing those issues, the best interests of the minor child remain the yardstick against which everything must be measured. It is the paramount consideration. In *Shawzin v Laufer*, [2] a matter decided before the advent of the Constitution, the court stated:

‘In view of the circumstances of this case, I think it necessary to make a few comments on the duty of a Court, sitting as upper-guardian of minor children, when it has to resolve a dispute concerning custody. To the Court, as upper-guardian, the problem of custody is a somewhat singular subject, in which there is substantially one norm to applied, namely the predominant interests of the child.’

[23] The Constitution of our country echoes the importance of the concept of the best interests of the child. Section 28(2) of the Constitution reads as follows:

‘A child's best interests are of paramount importance in every matter concerning the child.’

Section 28(2) has been interpreted as creating an ‘expansive guarantee’ and constitutes, not only a guiding principle, but also a right.[3] The principle of the best interests of the child has also been incorporated in section 9 of the Children’s Act 38 of 2005 (the Children’s Act).

[24] The importance of protecting the best interests of minor children lies partly in the fact that they are a vulnerable group of people that make up a large constituent part of our society, but they lack the means to act in their own interests. There are other reasons as well. The preamble to the Children’s Act stresses that the protection of the interests and rights of minor children:

‘... leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children’s rights in isolation from their families and communities’.The preamble to the Children’s Act goes on to state that, in addition, children must be

protected and assisted to facilitate the: ‘full and harmonious development’ of their personalities and should be

permitted to grow up in a family environment and in an atmosphere of: ‘happiness, love and understanding’.

[25] Prior to the new Constitutional dispensation, courts tended to be guided by an unwritten rule that dictated that the custody of young children should invariably be awarded to the mother. In *Myers v Leviton*, [4] regarded widely as being the high-water mark of judicial conservatism on custody matters, Price J expressed this philosophy as follows:

‘There is no one who quite takes the place of a child’s mother. There is no person whose presence and natural affection can give a child the sense of security and comfort that a child derives from his own mother – an important factor in the normal psychological development of a healthy child.’

[26] The maternal preference rule, however, has never been a rule of law but has always merely been what it says on the box, a statement of judicial preference.[5] That this is so is demonstrated by the fact that:

‘... for decades the law in South Africa with regard to the award of custody is that the best interests of the minor child must prevail.’[6]

[27] Times have, however, moved on and views on parenting have changed. In *V v V*, [7] Foxcroft J acknowledged this change when he stated:

‘The old position where the custody of young children was invariably granted to mothers has changed. As far as young children are

concerned, the pendulum has swung to accommodate the possibility of a father being a suitable custodian parent to young children.’ This

change was brought about because of society reassessing the concept of ‘mothering’. The word ‘mothering’ is redolent of gender, but society came to the view that there is a place for men in the concept of ‘mothering’. Thus, in *Van Der Linde v Van Der Linde*, [8] Hattingh J stated that he could not accept the universally prevailing axiom that ‘mothering’ was a component of a woman’s

being only and accepted that it was a part of a man’s being as well. A man could be as good a ‘mother’ as the biological mother and, conversely, a mother could be just as good a ‘father’ as the biological father. The quality of a parental role is now not simply to be determined by gender. This view was followed in *Van Pletzen v Van Pletzen* [9].

[28] There is thus a line of judicial reasoning that supports the principle that the quality of parenting is not simply gender based. Each case, however, must be determined on the facts that apply to that matter. The development of the law in this direction does not mean that maternity is no longer a factor to be considered by a court. In *Ex parte Critchfield and Another*, [10] Willis J stated as follows:

‘In my view, given the fact of pregnancy or, more particularly, the facts of the dynamics of pregnancy, it would not amount to unfair

discrimination (ie it would not be unconstitutional) for a court to have regard to maternity as a factor in making a determination as to the custody of young children. On the other hand, it would amount to unfair discrimination (and, correspondingly, be unconstitutional) if a court were to place undue (and unfair) weight upon this factor when balancing it against other relevant factors. Put simply, it seems to me that the only significant consequence of the Constitution when it comes to custody disputes is that the Court must be astute to remind itself that maternity can never be, willy-nilly, the only consideration of any importance in determining the custody of young children. This, as I have indicated above, has for a long time been the position in our common law.’

[29] In an ideal world, it would be in the best interests of the minor child if she continued to form part of an intact, united, loving family where her needs were catered for and where she felt secure. In such circumstances she would be given the best opportunity to develop into a well-balanced and responsible member of society who will be able, one day, to contribute to her society. That the minor child is not in ideal circumstances in this matter is

obvious. The fact that the once happy home that she formed part of is no longer in existence cannot be avoided. Inexorably, life continues, and the best must be made of it. It is now in the best interests of the minor child that she matures in a peaceful, dignified environment where her estranged parents behave like adults and show respect for each other and do not expose her to any disputes that may exist between them. Under no circumstances is the minor child to be manipulated to extract an advantage for the one parent at the other's expense.

[30] In my view there are indications that the applicant has attempted to do exactly that. As previously mentioned, last year he enrolled the minor child at Hilltops. She would have been four years old when this occurred. The bizarre thing about this is that the applicant, by agreement, only had the minor child with him every alternate week. The minor child accordingly only went to school every second week. It is difficult to understand what benefit that could possibly hold for her. At the lowest level, it must have been confusing for her. On a higher level, she would constantly be behind her fellow pupils, which may have affected her self-confidence. The respondent submits that it was a stratagem employed by the applicant to try and establish a status quo that he could insist upon retaining when the question of who should be appointed as her primary care giver was brought before the court, as both parties both knew would inevitably occur because of the positions that they had adopted on the issue. In other words, that it was a calculated ploy invoked by the applicant to strengthen his position as custodian parent. The applicant responds to that allegation as follows:

‘The child needed, in my opinion, interaction, and preparation for her future schooling career, and the decision was made solely with S[...]’s best interests in mind, and certainly not my own future schemes, as the Respondent seems to project;’

Implicit in this explanation is that the applicant must have believed that while the minor child was with him, she lacked interaction with others. It is also evident therefrom that the decision was made without reference to the respondent, in breach of an order of the Lion’s River Children’s Court which provided, *inter alia*, that:

‘The parties shall consult with one another in respect of all major decisions before such decision is taken, such as the minor child’s

educational, medical, religious and cultural needs.’

In this latter regard, the respondent states that:

‘... the Applicant informed me that he had made a unilateral decision to place S[...] in school, and that she had attended school that Friday.’

[31] In my view, there is merit in the respondent's submission that the enrolment of the minor child is a stratagem employed by the applicant as I can discern no other purpose behind such a strange arrangement. I am fortified in this conclusion by the fact that in a report prepared by the Office of the Family Advocate dated 31 August 2022, one of the reasons advanced by the applicant as a ground for him to be awarded care of the minor child was the following:

'He has already enrolled the child at Hilltops Pre-primary school.'

[32] There is another aspect of the applicant's approach to this matter that troubles me. It is to do with the respondent's mother. I have no specific knowledge of the offences that the respondent's mother committed let alone the circumstances under which they were committed. I do not know when they were committed. I also do not know whether she has been rehabilitated. I am certainly not able to endorse the applicant's insulting views that the respondent's household as it is presently constituted lacks morals or ethics.

[33] The applicant has spoken in disgraceful and disrespectful terms about the respondent's mother. I have already narrated an extract from the applicant's founding affidavit earlier in this judgment. I remain unconvinced that it was necessary, or relevant, to raise the issue of her criminal convictions. But even if I am wrong in this regard and it was correct to do so, it ought to have been raised in a more measured, less offensive manner. I am simply unable to accept that it follows that a criminal conviction, or convictions, renders the respondent's mother unworthy of having a place in her granddaughter's life.[11]

[34] While the applicant has been scathing in his views of the respondent's mother, I take a different view on the matter. Support systems are vital when it comes to rearing children. It is not possible for a single parent to always be in attendance when required and the presence of an older relative is often a great boon for such a single parent. Rather than view her presence in the respondent's and minor child's life as a negative feature, I view it as a positive factor.

[35] The psychologist who prepared a report and the issues, Mr. Clive Willows, performed a psychological assessment of the parties. As regards the applicant he concluded as follows:

'Within relationships he may be demanding of others but will resent demands being placed on him. It is likely that he would want circumstances to be as he chooses and to project an image of being correct and resistant to criticism. There is evidence of a history of anti-social behaviour and repressed hostility. He perceives himself to be socially withdrawn.'

With regard to the respondent, Mr Willows concluded as follows:

‘The clinical profile raises no concerns regarding a specific pathological condition. She presents with mild symptoms of depression and somatic complaints. She has suspicious, distrustful thoughts but these are probably associated with her current circumstances rather than being of a pervasive or extreme nature. She tends to isolate herself socially which may be due to her distrusting thoughts.’

[36] These finding by Mr Willows tends to confirm the respondent’s complaints that the applicant is unresponsive to requests made of him, ignores inputs she provides and is content to act on his own accord irrespective of any orders or agreements that bind the parties. In my view, the potential for further conflict in the future looms large if he is awarded sole care of the minor child.

[37] In coming to a decision, it is impossible to not attach any weight to the age of the minor child. She has just turned five years old. She is entirely dependent on her care giver for her survival and will continue to be so for some considerable time. She is also at an impressionable age. In my view, it would be in her best interests to traverse this period of her life whilst being cared for by the respondent. As Maya AJA stated in F v F[12]:

‘Despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender-based. It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce.’

[38] Given the lack of co-operation that exists between the parties it is inevitable that there should be many disputes of fact on the papers. I have been careful not to simply resolve those disputes using the approach advocated in Plascon-Evans Paints (Tvl) Ltd. v Van Riebeeck Paints (Pty) Ltd.[13] This is because adopting such an approach may incorrectly result in disputes concerning the minor child being resolved by way of an assumption rather than by way of an established fact.

[39] This morning, Ms Franke who appears for the applicant, handed up a draft order that proposed to deal with the matter on an interim basis. I would be requested to grant an order that would apply in the interim and the parties could revisit the issues at a later date in the future. I have considered whether there is any merit in this. I think there is not. The whole basis for the bringing of the application in the first instance was for a final decision to be taken on where the minor child should have her principal place of residence and which school she should go to. To grant an interim order would undo that. Finality is what the parties sought. That is what they shall get.

[40] After considering all the competing issues and the personalities involved, and notwithstanding the fact of the move away from the maternal preference rule, I have formed the view that it is in the best interests of the minor child that her primary place of residence should be with the respondent. It follows that the respondent must be enrolled at the school proposed by the respondent, namely Atholton Primary School.

[41] The applicant's role in the minor child's life must, however, continue to be acknowledged and honoured. He has previously enjoyed liberal contact with the minor child. He will not be able to enjoy the same contact given the order that I intend making and the respondent should be sensitive to his needs and ensure that he enjoys as much contact as possible. Indeed, I would urge both parties to take a moment to reflect on the status of their relationship and to try and improve it. Nothing can change the fact that they both contributed to produce the miracle of nature that is their daughter. They will have to have dealings with each other for many years to come. Their relationship would be enhanced and would be more tolerable if they interacted as friends rather than as embittered former partners.

[42] I accordingly grant the following order:

MOSSOP J

APPEARANCES

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Instructed by:

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Counsel for the respondent

: Mr J W Temlett

Instructed by

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2 Charles Way

Kloof

Date of Hearing

: 13 January 2023

Date of Judgment

: 13 January 2023

[1] P v P 2007

- (5) SA 94 (SCA) para [14].
- [2] Shawzin v Laufer 1968 (4) SA 657 (AD) 662G-H.
- [3] S v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008
- (3) SA 232 (CC) para [22].
- [4] Myers v Leviton 1949
- (1) SA 203 (TPD) 214.
- [5] Bashford v Bashford 1957
- (1) SA 21 (N) 24.
- [6] Ex parte Critchfield and Another 1999
- (3) SA 132 (W) 142B-C.
- [7] V v V 1998
- (4) SA 169 (C) 176F-G.
- [8] Van Der Linde v Van Der Linde 1996
- (3) SA 509 (O) 515B-C.
- [9] Van Pletzen v Van Pletzen 1998 (4) SA 95 (O) 101 B-E.
- [10] Ex parte Critchfield and Another 1999 (3) SA 132 (W) 143A-E.
- [11] Obviously, I do not include a person who has a criminal conviction for sexual offences involving young children.
- [12] F v F 2006 (3) SA 42 (SCA); [2006] 1 All SA 571 (SCA) para 12.
- [13] Plascon-Evans Paints (Tvl) Ltd. v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984).

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