

SOUTH AFRICA / JUDGMENT

Y.S v S.S (9895/25) [2025]

ZAWCHC 125 (18 March 2025)

[2025] ZAWCHC 125

COURT

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

9895/25

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IN THE HIGH COURT OF

SOUTH AFRICA

(WESTERN CAPE

DIVISION, CAPE TOWN)

Case No: 9895/25

In the matter between

Y[...]

S[...]

APPLICANT

AND

S[...]

S[...] B[...] S[...]

RESPONDENT

Date of Hearing:

07 March 2025

Date of Judgment:

18 March 2025 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

- [1] This is an opposed urgent application wherein the applicant sought the appointment of an educational and child psychologist to conduct a care and assessment related to the parties' parental responsibilities and rights at the applicant's costs with the respondent to co-operate, as regards their minor child. The applicant also sought terms to regulate supervised contact with the child pending the assessment report. The applicant sought the respondent to pay the cost of the application on a scale as between attorney and own client.
- [2] The parties were married to each other. The child, who was now 13 years old, was born during the marriage. The parties were now divorced. At the time of the divorce the parties agreed to terms and conditions of a consent paper and parenting plan, which regulated the care and contact with the child. It provided for the respondent to be the primary caregiver and the applicant's contact with the child. The parties had difficulties with co-parenting. At one stage the applicant sought to have the primary residence of the child changed to him and this was opposed. The primary residence of the child was never changed, but only the terms of contact. At one of the days that the applicant was to pick up the child, the child refused to go and claimed that the applicant was physically violent with the child, made threats and abused the child verbally and emotionally. The respondent assisted the child to lay a criminal charge against the applicant, which case is still pending. The applicant denied the allegations and accused the mother of using the child as a stratagem to restrict and frustrate his contact rights. The child's views were to remain with the respondent as the primary caregiver, and to visit the father. After the allegations of physical violence and abuse, the minor child did not want to visit the father at all, but was prepared to consider supervised visits until the child was sure that there was no risk of abuse.
- [3] The applicant approached the Children's Court to enforce his contact rights. The Children's Court's order provided telephonic contact and limited his contact to supervised contact to Sundays for 3 hours during the day. The Children's Court ordered an investigation by a clinical psychologist to investigate the applicant's claims of parental alienation, and to conduct integrated sessions between the applicant and the child and to investigate the issues around the applicant's contact. The child, out of own volition, refused to see the applicant. The respondent requested the child to speak to the father and tell the father directly. The respondent took the child to the father for this purpose. It was on this day that a person found at the applicant's place had a confrontation with the respondent as she did not want the respondent in the house. This happened in front of the child and since then the child refused to have any contact with the applicant. The respondent was subsequently arrested for the alleged assault on the child. The child was selected to play in a national tournament. The child was obviously proud and excited about this success. The applicant wrote to the

school, denying consent for the child to take part in the tournament. There was a need for professional intervention to advise the applicant that this type of behaviour caused the minor child to become increasingly resistant to form a relationship with him. The respondent intervened and the child's participation in the tournament was confirmed. The minor child also became aware that the applicant had applied for a reduction in his contribution for the maintenance of the child. The clinical psychologist reported that it was both parents who made the child explicitly aware of the adult politics as well as the legalities involved in the matter. The minor child resented the applicant for the possibility that the child might have to go to a new school, make new friends and start all over again, with new teachers, as the mother could not afford the current school on her own.

- [4] The child refused to see the applicant since October 2024. The respondent encouraged contact, but it was the child who refused to have contact with the father. The refusal to have contact was given by the child to the prosecutor in the criminal case, the magistrate presiding in the Children's Courts, the child's legal representative appointed by Legal Aid South Africa (LASA), the school counsellor and the psychologist appointed by the applicant. The child is in High School and was hostile to further assessments. The respondent held the view that the psychologist only dealt with alleged parental alienation, facilitating integrated sessions between him and the child and the supervised contact. He now required a proper, in-depth, independent care and contact assessment in the child's best interests. He was unhappy with the progress made by the clinical psychologist appointed at his instance. The applicant believed that the change in the minor child's behaviour towards him was influenced by the respondent.
- [5] The relationship between the parents was correctly described by the clinical psychologist as acrimonious and seriously adversarial. The clinical psychologist was appointed to introduce a reintegration therapy initiative which was intended to help facilitate the reunification of the child and the applicant. The clinical psychologist has also correctly characterized this matter as a complex one. This is not an ordinary 'he said, she said' dynamic which often characterizes contact disputes. It is made more complex by the refusal of the child to see its father and the pending criminal assault charges against the father made by the child. Although the clinical psychologist had gone so far as to get the father and child to a point where a small increment in time spent together could be considered, he favoured gradual, phased-in contact arrangements as the child found itself within what he called a toxic adult politics which created a messy and unacceptable adversarial climate. The clinical psychologist identified a need for the applicant to temper his attitude as regards his rights as well as his perceived sense of entitlement. There was a need for the applicant to find out how his son really perceived him and how the son experienced him as a father on an emotional level. On the other hand, the clinical psychologist identified undue overprotection of the son by the mother and the danger of inadvertently creating in the son an erroneous belief that his voice was the only one that needed to be heard. There was a danger that the child was beginning to call the shots whilst, as a child, ignorant of the bigger picture. The child had confirmed to the clinical psychologist that he had made conflicting

statements regarding his choice of primary caregivership, willingness to phone his father and supervised contact. The child explained the contradictions as due to feeling pressurized and intimidated by his father particularly when alone with him. The child was scared of confrontation, was eager to please and not to disappoint his father and he said some things purely to avoid conflict. The child expressed a preference to stay with the mother as the primary caregiver, and comfortable with telephonic contacts on Wednesday afternoon and physical contact every alternate Sunday under supervision. The clinical psychologist did not find any evidence of parental alienation. There was a need to continue with father and son mediation and implementation of various reintegration therapy initiatives. The clinical psychologist, having learned of the urgent application, expressed the view that duplication of his existing involvement was not only ill-conceived but was contraindicated and counterproductive especially for the child. Simply put, it was unnecessary and runs the risk of paradoxically promoting further estrangement of the father and son. The reintegration therapy was necessary for the father and son to continue. Its fruitfulness and productive progress had been spoiled by the applicant's attempt to sabotage the son's attendance of a national school soccer tournament. The reintegration needed to be a well-indicated gradual and phased-in contact approach. The applicant's sense of entitlement, impatience and generally impetuous demeanour at continuously pushing and trying to accelerate contact was not helpful to the process. The clinical psychologist received a report from the respondent that the public prosecutor had considered recommending that no contact whatsoever take place between the applicant as an accused and the child as a state witness, unless certain provisos were met by the applicant. The clinical psychologist could not in clear conscience proceed with the scheduled reintegration therapy session for 7 November 2024 and placed his therapeutic role on hold until clarity was provided. A letter from the respondent's attorneys to the applicant advised him that contact could not continue due to the criminal charges against him. It seems that the Children's Court position was that there should be an outcome on the criminal matter before any further interventions could continue. This was communicated to the clinical psychologist by the child's legal representative appointed by the LASA.

- [6] The child had met a counselling psychologist before the clinical psychologist was involved. The child attended the session of their own free will and spoke freely. The child showed no signs of anxiousness or any indication that he felt coerced. The results were that the child had no indication of depression. The clinical overview was that the child showed no signs that he was being coerced. The child stated that it did not want to have visits with his father at that moment, due to incidents that had occurred in 2023. The child indicated that he would feel comfortable with supervised visits until he could be sure that similar incidents would not occur. The child was comfortable with the mother in their home. The child was described as a well-mannered, engaging and insightful young man. The counselling psychologist's recommendation was that the child's wishes on parental visitation, although she saw him when he was 12, should be respected. The previous month the child had seen a school counsellor. Of relevance was that he had told the counsellor that he did not mind

living with either parent. He had shown no reason to continue to see the counsellor. Two days after the report, the counsellor had written to both parents. In that email, the counsellor advised the parents that the child had expressed a preference to stay with the mother, and that he had not reported this earlier as he did not want to hurt his father's feelings, and that the child had given his consent for her to inform the parents.

- [7] It was against this background that the applicant approached the High Court with an urgent application. On the date of set down the child's legal representative had not yet filed her submission and the matter was postponed to the date where I was seized with the matter. The child's voice as advanced by the legal representative was that the child refused to go to the applicant because every time the child struggled with his school work, the applicant hit him. The child referred to two incidents in June and August 2023 where the applicant punched the child on his chest. The applicant had hit the child several times before and the child had lost count of how many times it happened. During these period the child was scare to go to the applicant but was also scared to speak out. The child had been hit on his arms and chest to the extent that he had blue marks. The abuse intensified

when the child told the applicant that he wanted to stay with his mother. The child indicated that when he said he wanted to stay with his father, he was too scared to say what he really wanted. The child wished to reside with the mother and to go to the same school. The child said he wanted supervised contact, which was suggested to him by his mother. The child indicated that the applicant told the child that he was slow to do things, he was dumb and swore at him. The child was not ready to see the father and needed some time, about a month, to think about it. The child preferred a social worker to supervise the visits. This was because the earlier supervised visits were supervised by Aunt Tasnem and Uncle Razaad but the applicant was rude to him, sometimes ignored him and argued with him when he arrived late for the contact. The child did not enjoy the supervised contact. The child preferred supervised contacts to remain until the reintegration therapy was completed. The child expressed anger at his father for the physical abuse, and preferred telephonic contact for now. The child feared that since the court proceedings, the applicant might swear at him or tell him he did something wrong. The child was open to counselling, so that he could amongst others tell his father how he felt. The child told his legal representative that he only spoke out when the respondent indicated to him that he had to go to

Durban with his father. He was scared to go to Durban with his father and to be alone with his father. The child indicated that although his paternal grandmother was in Durban, his paternal grandmother was also scared of the applicant.

- [8] The child explained that the nature of the assaults also included hitting him on his shoulder, on his face and swearing at him. He had bruises on his chest and once he had a bruised lip which he had to die from his mother. He did not tell his mother before because he knew he still had to go to his father again and this might cause trouble. His father once smacked him against his ear which left his ear red and his father told him to tell his mother that he was hit by a soccer ball. The abuse included punching, slapping with opne hand and back of hand

through his face, kicking him and pushing him off chairs and kicking him whilst lying on the floor. During 2023 he was in a bad space, felt depressed and did not want to live anymore. He felt he could not tell anyone about the abuse. The child however spoke to his friend who motivated him to live. The child asked this not be told to anyone. The legal representative explained that she had to disclose it to adults who would help and protect him and he consented that this be disclosed. His father always appeared angry and anything could set him off. That was why the child tried to do everything right.

According to the child, the father was like that even with his own parents. The child indicated that his mother disclosed to him that she was also physically abused. He had no independent recollection as they divorced when he was two years old. The child enjoyed cricket and he feared not being able to play cricket on Saturdays and Sundays as his father would not allow it when it was on his contact weekend. The child indicated that if he wanted to see his father he would call him but he did not want to see him on forced terms. The child did not feel safe to be with his father now that the criminal case was running, because the father would be angry at him.

[9] The parents have been involved in seven court cases and during all these cases the child has been at the centre of the litigation. The respondent also referred to the child being made aware of the father's intention to have his maintenance payments reduced. During this application the respondent's attorney advised the child's legal representative that the child was anxious about this application. It could only be the mother who told the child as she was the only one with contact. The disclosure of the litigation was disheartening and inappropriate. On the other hand, it was the applicant who expressed reservations to the children's court, about the clinical psychologist's recommendations with reintegration therapy which included supervised contact, whilst the criminal case was pending. It was the applicant who informed the children's court that he was advised by the police to not have contact with the child, which caused the children's court to postpone the matter to obtain the outcome of the criminal matter and only then to determine how the reintegration therapy should proceed with the applicant and the child. The commitment of both parents to comply with the recommendations of the clinical psychologist were curtailed by the pending criminal case. It was the legal representative's view that it was justifiable for the child to be scared and anxious about the pending criminal case as a complainant and witness. The parents needed proper intervention and guidance to see the light for they had been at each other's throats for many years. The tension between them was such that the child could not even confide in any of them that he was in a depressive state and considered self-harm at some stage. The child had instead confided in another child who was his friend. In other words, the self-centred parents left the child emotionally and psychologically unattended so much so that it became the responsibility of another child in the child's safe who saved his life. They were too consumed by their egos, pride and the "I will show him/her" syndrome to even see the pain and suffering of the child they lived with. The child's legal representative recommended that the matter be postponed sine die, until such time when the criminal proceedings were disposed of and that when the criminal case was finalized, the parties jointly appoint a parenting co-ordinator.

[10] In *Z D E v C E*[1] it was said:

“[16] This Court in P v P[2] stated that the determination of the best interests of the child, ‘in any particular case involves the [h]igh [c]ourt making a value judgment, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children’.[3] In this regard the court is not looking for a perfect parent but to find “the least detrimental available alternative for safeguarding the child’s growth and development.”[4]

[17] Our Constitution echoes the importance of the concept of the best interests of the child. Section 28(2) of the Constitution provides that the child’s best interests are of paramount importance in every matter concerning the child. The principle of the best interests of the child has also been incorporated in s 9 of the Children’s Act 38 of 2005.

[18] Whilst the parties’ right to contract should be respected, in matters dealing with minor children, the court has a duty to enquire whether any arrangement by the parties would serve the best interests of A.”

[11] The main issue, even before the children’s court, was the reluctance of the child to exercise contact with the applicant. The process of integration went well until the applicant attempted to cancel the child’s trip to a national soccer tournament in Durban. The applicant appears to have treated the child poorly during the contact sessions. The criminal allegations then emerged. It was the applicant who raised concerns about reintegration when it was considered in the children’s court and has now turned around and approached the High Court with this application. The approach of the Children’s Court was also not very helpful.

It is common knowledge that criminal trials in the magistrates’ courts take very long to finalise, for a variety of reasons, the main being, it not being a continuous roll and accused persons having to come generally three times or more even after pleading before the matter is finalised. It takes longer to plead and if convicted sometimes even takes months for sentencing. The effect of the Children’s Court approach meant that the applicant may have to sit out the whole of 2025 and maybe even the better half of 2026 before the question of his contact with the child was investigated by the children’s court. It is even possible that the child would reach 18 before this question was put to rest. The approach of the Children’s Court did not give me the appetite to consider remitting the matter back.

[12] I am not persuaded that the process which the clinical psychologist had commenced needed to start afresh, be duplicated or strengthened with another equivalent investigation. In my view, he must be given the space and co-operation of the parties to fully investigate, work on the therapy and rebuild the relationship between the child and its father. The reintegration therapy initiative that the clinical psychologist was involved in, was meant to facilitate reunification between the applicant and the child. The attempt by the applicant to suggest that it was something separate from contact with the child is simply semantics. In co-operating with the therapist, it is necessary for the respondent to realise that her sharing of ‘parental politics’ with the child must have its own limits. She was adult enough to unsaddle

the horse of spite and discern when she was sharing too much information necessary for the growth and development of the child, especially as regards the child's relationship with the father. Toxic parental politics was a no-go area for her in her discussion with the child. She must refrain from using the child as a tool in her battles with the applicant. Equally, in co-operating with the clinical psychologist, it was necessary for the applicant to look into the mirror, and realise that some of his own thought processes, especially his subjectively perceived sense of entitlement, was discernible on his own child. The attitude of his son resembled and corresponded with his own, as regards the visits. He wanted them and his son was against it. The only difference is that they were pitted at the different ends of the tug-of-war. Instead of being the father, the applicant has reduced himself to an equal of his own son and was competing against his own son. This application, instead of confronting the devil that the clinical psychologist has illuminated for him, is but an example of the length to which the applicant would stretch in the contest for strength and dominance. To avoid being seen making his own son an adversary, he blamed the respondent for the son's own decisions. The applicant must strive to understand how his own son perceived him and

then strive to work on the emotional levels where he and his son experience each other. Blaming the respondent for his own shortcomings was not helpful. The applicant's impatience with a gradual and phased-in approach does not make the clinical psychologist wrong or biased. An urgent application should never be confused for an instrument towards an impetuous decision.

[13] For these reasons I make the following order:

- (a) The matter is treated as one of urgency.
- (b) The application to appoint Ms Leigh Pettigrew, an educational and child psychologist, under the circumstances, is dismissed. The appointment at the applicant's instance, of the clinical psychologist currently working on the matter, to continue at

applicant's cost, is confirmed.

- (c) The clinical psychologist shall continue to conduct integrated sessions between the applicant and the child, which shall include

joint father and son mediation sessions and the implementation of various reintegration therapy initiatives, individual consultations

with the parents and the child as the need arose as well as any other intervention that the clinical psychologist may deem necessary. All the expenses shall remain at applicant's cost.

- (d) The Social Worker from the Department of Social Development, Western Cape, appointed and or designated for the precinct where the applicant resided, or that Social Worker's designate, shall supervise the contact between the applicant and the child for as long as the criminal court has not passed judgment on the merits or the matter between the applicant and his son was in any other way disposed on the merits, and the clinical psychologist deemed it no longer necessary. During the supervised contacts, the applicant shall not

directly, indirectly or through another discuss the merits of the criminal case or in any way whatsoever make any reference thereto, with the child.

- (e) The applicant shall have supervised contact with the child on Sunday 30 March 2025 and thereafter on every alternate Sunday between 10H00 and 17H00. The clinical psychologist shall review the supervised contact arrangements every quarter and shall adjust them as the exigencies needed or work on them incrementally as the situation demanded. The clinical psychologist shall prepare the child and the parents for the whole intervention journey.
- (f) No costs order is made.

DM THULARE

JUDGE OF THE HIGH COURT

[1] (1011/2022) [2024] ZASCA 159 (18 November 2024) para 16 to 18.

[2] P v P [2007] ZASCA 47; [2007] 3 All SA 9 (SCA); SCA 2007 (5) 94 (SCA).

[3] P v P para 14.

[4] P v P para 24

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