

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

CASE NO: A5061/2014

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| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES:
YES/NO |
| (3) | REVISED. |

18 August 2016

DATE

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SIGNATURE

In the matter between

D, A

Appellant

And

C, A

Respondent

JUDGMENT

Victor J (Concurring Makume J and WeinerJ)

Summary: Father seeks contact with his 17 year old daughter who refuses to see him – litigation about father’s contact with daughter ongoing for almost 13 years including his rights of access as an unmarried father- mother alienated daughter from her father from the age of 3 years to the present – grave injustice committed by mother alienating daughter from her father.

VICTOR J:

[1] The issue for determination in this appeal is whether a father,(the respondent) of a 17 year daughter (D.) can enforce his rights of contact to her.

The Grounds of Appeal

[2] This appeal relates to the application heard before Schwarz AJ which as a continuation of the original application commenced in 2002 by the respondent to have contact with D.. The appellant is the mother of D.. There were several grounds of appeal.

2.1 The primary issue was that the matter commenced in 2002 and the Children’s Act No 38 of 2005 only came into force in July 2007. The appellant submitted that the question of contact should not be decided on current child care principles and jurisprudence but on principles

applicable in 2002. At that time, at common law, a father who was not married to the mother of his child had to show special grounds as an interested party for a court to interfere with the mother's custodial rights. This is an extraordinary approach and is contrary to current jurisprudence which is clear that a child's best interests are to be adjudicated at the time a matter is heard in court and not based on approaches relevant 14 years ago when considering children's best interests. This aspect of the appeal must fail.

2.2 A further ground of appeal was the failure by the court *a quo* to take into account a number of sections of the Children's Act No 38 of 2005 ("*the Children's Act*") covering the objects of the Children's Act, the best interests of the child standard and other general principles relating to children. The appellant contends that the court *a quo* did not take into account D.'s best interests.

2.3 The appellant also asserted that the court *a quo* was in fact punishing D. by ordering her to have contact with the respondent because of the appellant's role in alienating D. from the respondent. D. does not wish to see the respondent and the appellant submitted that that the court *a quo* ignored her wishes, her opinion and the right to be heard

given her age and maturity and ignored the realities of the present situation.

Background Facts

[3] The appellant and D. live in Cape Town. The respondent lives in Johannesburg. The parties were never married.

[4] The respondent launched an application for contact to D. in 2002 which was only brought to completion in 2014. The court a quo granted the following order set out below:

- 1.1 'The applicant (the respondent in these proceedings) is entitled to the following contact with D. D. (the minor child): For a period of 6 months commencing from date of this Order, the Applicant shall be entitled to meet D. for a period of two hours per month, at a restaurant, alternatively at the residence of G. C.;
- 1.2 Reasonable telephonic contact.
1. Upon the expiry of the 6 months, for a further 6 months thereafter:
 - 2.1 Applicant shall have contact for a period of four hours in a public place;
 - 2.2 Reasonable telephonic contact.
3. Thereafter :
 - 3.1 From 08h00 to 17h00 on the first Saturday, alternatively Sunday

of each month;

3.2 Reasonable telephonic contact.

4. The applicant will pay for the travelling costs in respect of the contact.
5. The parties shall share the costs of the psychologist to be appointed to assist with the phasing in process.
1. The respondent (the appellant in these proceedings) is ordered to pay the applicant's costs on a party and party scale.'

Background facts

[5] The parties started cohabiting in January 1994. The appellant fell pregnant in 1998. The respondent extended the appellant's home to accommodate the birth of D. who was born on 30 October 1998. Soon after D.'s birth, the appellant commenced alienating D. from the respondent. He was not involved in any decisions regarding D.. The appellant's mother's family and friends would arrive at the house and remove D.. The appellant and D. would disappear over weekends without telling him where they were going.

[6] In July 1999, after an argument, the respondent admitted that he slapped the appellant twice on the cheek and ordered her to leave the bedroom. On 6 July 1999, he was issued with a protection order and vacated the common home by 31 July 1999. He opposed the protection order and it was substantially amended. Thereafter the appellant did

allow the respondent to visit D. and occasionally called on him to babysit. This arrangement lasted for approximately 18 months. There were several arguments which included the appellant disallowing the respondent from seeing D. at pre-school. One of the experts stated that it was very difficult for the respondent to be pushed to the periphery of D.'s life.

[7] On 21 January 2002, there was an incident where he assaulted the appellant at a petrol station and pursuant to that incident he sought professional help and underwent treatment for anger management. On 9 June 2004, Mrs Dooley of the Family Life Centre reported that:

‘A. C. has attended counselling since December 2003. He sought assistance to help him cope with his depression and despair at being denied access to his daughter. He realised that his aggressive behaviour was self-destructive. He has attended counselling weekly since December 2003 to date. He has gained insight, and is managing his frustration and anger more appropriately. In my opinion at the time he struck A. D. in November 2003 he had lost control; this was in part due to his belief that A. was delaying and avoiding resolution and was alienating him from his daughter – his feelings of helplessness and anger overwhelmed him. ‘

[8] Since that incident, the appellant has refused to allow the respondent contact with D.. After the litigation commenced in 2002,

it stalled for a number of reasons. In 2006 the matter was referred to the family advocate. The same year a report was filed by a psychologist Ms Annemarie Rencken-Wentzel (Wentzel). On 23 October 2008, a supplementary report was filed by the family advocate and one by Dr Burke, a clinical psychologist.

[9] On 4 September 2009 Willis J as he then was, appointed psychologist Mr Terry Wilke to prepare D. for contact. Mr Wilke filed a report to state that the appellant lacked the will to support the bonding process. Dr Burke gave an opinion that there was no reason for the respondent not to have access to D.. This was also the assessment of Wentzel. The respondent tried to get the appellant to attend consultations with the psychologists and even approached the court to compel her to do so. The various reports could not be finalised because the appellant refused to cooperate.

[10] The family advocate's office also investigated the matter. The family advocate appointed Dr Ronel Duchon, a counselling psychologist who also suggested that bonding therapy be done. All these experts and family advocates recommended that the contact between D. and the respondent be resumed. She has steadfastly refused to allow D. to see the respondent notwithstanding the expert evidence recommending same .

In 2006, the appellant moved to Cape Town with D., thus making contact even further out of reach. On one occasion the appellant asked the respondent to pay her school fees, he refused. He offered R1000 instead of R15 000. This also led to recriminations and made the appellant more bitter in her approach.

[11] In the light of the inordinate delays in this matter this court requested the Centre for Child Law to assist the court with further input as to D.'s present attitude to contact with the respondent. A further concern was that on 5 March 2014, D. deposed to an affidavit wherein she refused to see the respondent and alleged that he played no part in her life. Ms Carina Du Toit of the Centre for Child Law has produced a lengthy report which contains an incisive analysis of the family history and dynamics. This report has assisted the court in understanding the problems culminating in the sad result of the appellant succeeding in alienating D. from the respondent. Ms Du Toit has also assisted the court with extensive relevant legal opinion. I wish to thank the Centre for Child Law for their valuable input and submissions in the development of jurisprudence around this crucial topic of court ordered contact between child and parent.

[12] Ms Du Toit gave a fair exposition and evaluation of all the

allegations and counter allegations made by the parties. One assertion by the respondent is of significance and which could have served the bonding process between father and daughter.

Ms Du Toit noted:

‘The Respondent stated that he has had no photos, school report cards or any information regarding D. since she was three. He related how he had to pay for the services of tracing agents to find out where the Appellant and D. were staying in Cape Town. He did this in order to proceed with the litigation. The Respondent had found out that D. was a gifted pianist and that there was a recording of her playing. He requested a copy of the recording from G. C., the maternal grandmother, but according to the Respondent she refused to give him a copy. The Respondent became overwhelmed with emotion at this point in the interview and cried while explaining that he views himself as an artist and it is terrible for him to know D. is also an artist but he is not allowed to see her play. He believes art and music is something that will allow them to bond.’

D.

[13] Ms du Toit interviewed D. who she found to be cooperative and gave ‘clear and well-articulated answers to questions’. Because the enquiry is child-centered, it is important to deal with the detail of Ms du Toit’s interview with D.. Ms Du Toit found that D. explained her ‘feelings and opinions voluntarily without much prompting. She is very aware of the litigation and the history of the matter. She is obviously highly intelligent, accomplished and

shows an ability to reflect on questions before giving answers and an ability to reflect when confronted with a different opinion. She impressed me as very confident, organised and clear, both in articulating herself and in how she has arranged her life. She is responsible and dedicated to her school and the extra-curricular activities she is involved in.'

[14] D. advised Ms Du Toit that she would resist being forced to meet the respondent as he was a stranger to her. She stated that: 'It is creepy, I don't know him, he could be any person off the street.' D. told Ms Du Toit that it should always be her own decision whether she wanted to see someone or not. D. stated that

"If it is my decision then why is nobody listening to me? I have been saying the same thing for years but it has not been taken into account."

[15] D. advised Ms Du Toit that she wanted to enjoy her time left at school and felt the litigation was an intrusion and made her feel resentful. She is also fearful that she would be forced to bond or have contact with the respondent.

[16] Ms du Toit asked D. if she would meet with the respondent just once whereupon she became very agitated and refused and stated:

‘I am happy as I am right now and want people to understand that. I have everything going for me, these things will upset me and hold me back.’

The Law

[17] Ms du Toit correctly submitted that the most significant challenge in this matter was the passage of time and had the matter been dealt with earlier there would have been many more options available to remedy the situation. In my view, in the light of the appellant’s unashamed and extensive alienation of D., the enforcement of any order of court will not resolve the problem. The correct approach as suggested by Ms Du Toit is to determine what would be in the best interests of D. at this time, and what can reasonably be achieved.

[18] This approach would be consistent with the dictum in *AD v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) where Sachs J stated in para [50].

[50] Determining the best interests of the child cannot be circumscribed by mechanical legal formulae or through rigid hierarchical rankings of care options. As was stated in M:

A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To

apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned. In practice this requires that a contextualised case-by-case enquiry be conducted by child protection practitioners and judicial officers versed in the principles involved in order to find the solution best adjusted to the child, taking into account his or her individual emotional wants, and the perils innate to each potential solution.’ (footnotes omitted).

[19] In my view the damage to this father/ daughter relationship has been done and at this stage appears to be irreparable unless there is a change of heart on the part of the appellant and D.. A child has a much better chance at happiness and stability when able to share the joys and tribulations of life with both parents albeit that in this case both parents are flawed and not without blemish. The appellant’s continuous parental alienation of D. from the respondent from when she was three years old till this age of 17 years is deeply imprinted on D. and her approach to her father. Enforcing the order of court *a quo* at this stage without further input from Ms Du Toit would be counter-productive. This however does not mean that the order of the court *a quo* was wrong. The judgment and the order of the court *a quo* is to be commended and is consistent with societal and constitutional norms as set out in s 28 (1)(b) of the Constitution, that every child has a right to family. This also means that the appellant’s intentional alienation of D. from the respondent is an act

contrary to the Constitution's imperative of a child's right to both parents. Courts should not encourage such flagrant alienation practices by any parent. D.'s situation should be dealt with in a sensitive manner. She is conflicted by her own feelings and also wanting to protect and be loyal to the appellant.

[20] I am of the view that the order should stand but that the implementation thereof should be deferred. Ms Du Toit, who has demonstrated significant insight into the problem, will be requested to contact D. and to inform her that this appeal has been dismissed and the reasons therefore. This discussion would obviously also include the fact that the respondent has been attempting to make contact with D. since 2002, but that same has been withheld by the appellant. Ms Du Toit must also explain that a full court has adjudicated the matter and that this means several judges have considered this matter and are in agreement that it is better to unite families rather than countenance separation and alienation. There is no danger to D. should she be willing to see the respondent. She has clearly inherited certain artistic traits from the respondent, such as a musical ability, which could provide common ground for their bonding.

Conclusion

[21] The court a quo was correct in ordering the appellant to pay the costs of the application. She has steadfastly and consistently alienated D. from the respondent. This is reprehensible in the circumstances. The respondent was justified in seeking court intervention. As regards the cost of this appeal the decision of the court a quo has been upheld save for the proviso relating to Ms Du Toit's role. The respondent has been substantially successful and the costs must follow the result.

[22] The appeal fails on all the grounds raised by the appellant. The court a quo was mindful of all the provisions of the Children's Act generally and those referred to by the appellant. The court a quo did not ignore s 2(b)(iii), 2(b)(iv), 2(f), 2(i), 6(2)(a), 6(3), 6(5), 7(1)(a) to (h), 7(i) to (m), 9, 10, 23(2)(a) to (e) and section 31 of the Children's Act. The order will stand, with the proviso that Ms Du Toit intervene as set out above.

Accordingly, the following order is made:

1. The appeal is dismissed with costs;
2. The implementation of the order of the Court *a quo* is deferred sine die;
3. Ms du Toit is requested to contact D. and discuss with her the issues set out in paragraph 20 above.

M VICTOR
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

I concur

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

I concur

S WEINER
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