

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 22507/2021

NOT REPORABLE

NOT OF INTEREST TO OTHER JUDGES

27.06.23

In the matter between:

A C

Applicant

and

S A M

Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 27 June 2023.

Summary: Urgent application. The court granting interim order appointing a clinical psychologist and expert to investigate the minor child's best interest, specifically in relation to the issue of the primary residency of the minor child. On the return day the court had to determine the issue of the best interest of the minor child more importantly relating the province where he should attend the boarding school.

A child's best interest categorised as being of paramount importance in every matter concerning a minor child by section 28 (2) of the Constitution. The standard to apply in determining the best interest of a minor child set out in

section 9 of the Children's Act. The factors to take into account in considering the best interest of a child are set out in section 7 (1) of the Act.

JUDGMENT (Varied)¹

Molahlehi J

Introduction

[1] This matter initially served before the court on 18 May 2021 as an urgent application. The applicant in that application sought an order for the appointment of Dr Fabbro, a clinical psychologist, to investigate the minor child's best interest, specifically in relation to the issue of the primary residency of the minor child. The applicant further sought an interim order declaring the primary residency of the minor child to be with him pending the finalisation of the investigation into issue of the best interest of the minor child. He further sought an order suspending contact rights with the minor child.

[2] The rule nisi was extended on 17 April 2023 pending delivery of the judgment.

[3] The court, having found that the matter deserves to be treated as one of urgency, directed that Dr Fabbro should conduct the investigation into the interest of the minor child as prayed for by the applicant and further ordered that:

(a) The primary residence of the minor child be vested with the applicant,

¹ The judgment has been varied to correct the typographical errors as follows:

1. In paragraph 1 to replace the name [...]“ with [...],” the boarding school where the minor child is currently attending.
2. In paragraph 2 replace the word “Respondent” with the word “Applicant.”

- (b) The respondent be afforded telephonic contact with the minor child,
- (c) The applicant was obligated to ensure that the minor child attends school.
- (d) The respondent was prohibited from attending or collecting the minor child from the school.

[4] Following his investigation concerning the interest of the minor child Dr Fabbro issued the report in January 2022. The applicant then enrolled the matter for hearing for final adjudication on 8 August 2022 and sought an order in line with the recommendations of Dr Fabbro.

[5] The respondent was on the day of the hearing unrepresented. It became apparent during the hearing that she was unable to articulate her opposition to the application and the case she wished to present to the court. The matter was then postponed *sine die* for the court to facilitate the appointment of *pro bono* assistance for the respondent. The matter was further referred to case management by the court.

[6] After the postponement of the matter, several case management meetings were held. The discussions in those meetings were mainly about the procedure, including the arrangement to invite the minor child to appear in court and share his preference concerning attending the boarding school in KZN or Gauteng. The other issue which was dealt with during the case management process was the appointment of an expert to assist in formulating the questions to be posed to the minor child when he appears in court.

- [7] The respondent was granted leave to file her application for condonation for the late filing of her answering affidavit. I pause to indicate that the respondent failed to file her condonation application as was directed by the court. The applicant objected to the court entertaining the respondent's case when the matter finally served before it. The objection included other technical points, raised by the applicant the alleged defects in the answering affidavit. As appears from above, what is paramount in this matter concerns the interest of the minor child. It was for this reason that this court condoned the respondent's failure to comply with the rules. It further resolved to ignore all the technical points raised by the applicant and proceeded to adjudicate the matter as though the respondent had complied with the directive.

Background facts

- [8] It is common cause that the minor child, who is now fourteen years old, was born out of wedlock between the applicant and the respondent. The applicant, who is the biological father of the minor child, is eighty-four years old, and the respondent, the mother, is forty-one years old.
- [9] There is no dispute about the fact that the applicant maintains the minor child, including the respondent. The intimate relationship between the parties broke down after the minor child was conceived. It would appear that the applicant believes that the respondent "intentionally misled" him into conceiving the minor child. This is of no moment in the adjudication of the present application.

[10] The conflict between the two escalated to the extent of verbal and physical abuse of the applicant by the respondent. The applicant had to obtain a protection order against the respondent to address the abuse. She did not obey the protection order resulting in a six months' sentence being imposed on her.

[11] The respondent's complaint in opposing the application is that the applicant moved the minor child and placed him at a boarding school in Kwa Zulu Natal (KZN) without her consent. She avers that she is unemployed and thus cannot afford to travel to KZN to visit the minor child, and accordingly, she is denied access to the minor child. This will, according to her, destroy her relationship with the child, who will feel abandoned by his mother.

[12] In the heads of argument, the respondent's Counsel does not deal with the expert reports but simply argues that it would be in the interest of the minor child to be closer to the parents and in a boarding school in Johannesburg.

[13] The respondent further contends that the best interest of the minor child is for him to attend schooling in Gauteng, which will ensure that he receives proper care and supervision.

The law governing the best interest of minor children

[14] A child's best interest is categorised as being of paramount importance in every matter concerning the child by section 28 (2) of the Constitution.² The

² See *Raduvha v Minister of Safety and Security and Another* [2016] ZACC 24.

qualitative value of the importance of the best interest of a child is provided in section 9 of the Children's Act (the Act),³ which provides that the standard to apply in all matters concerning the care, protection and well-being of a child is that the child's best interests. The determination of what constitutes the best interest of a child or children has to be made based on the particular facts and circumstances of the child or children in question. The factors to consider in determining the best interest of a child are set out in section 7 (1) of the Act, which provides:

“Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

- (a) the nature of the personal relationship between-
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards-
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or

³ Act number 38 of 2005.

- (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child-
 - (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's-
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by-
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

- (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child."

[15] This matter concerns the responsibilities and rights of the parties to care for, maintain contact and the schooling of the minor child. In essence the matter involves the well-being of the minor in the home environment. It is an environment of conflict between the parents and extend to the situation where the respondent has already been found guilty of contempt of court in that she did not obey an order restraining her from using violence in resolving her conflict with the applicant.

[16] As alluded to earlier, the respondent's case concerns the right of access to the minor child, which she contends has been denied by placing the minor child at a boarding school outside the province of Gauteng. Section 18(1) of the Act provides for the rights and responsibilities of a parent in respect of a child and they include; the following rights and obligations (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child.

[17] It is trite that in matters involving children this court seats as the upper guarding and will, in determining what is in the best interest of a child, have regard to any information made available to it irrespective of legal technicalities that may

ordinarily restrict receipt of such information. This approach was adopted in *B v B*,⁴ where it was noted that the court in matters of this nature has very wide powers in determining what constitutes the best interest of and held:

"The court may have recourse to any source of information, of whatever nature, which may assist it to determine the best interests of children insofar as the primary caregiver for them is concerned. Legal niceties should not frustrate the quest to determine the best interests of a child."

[18] The same view was expressed in *AD and Another v DW and Others*,⁵ where the court held that:

"In matters of this nature, the interests of minor children will always be paramount. To this extent, the approach of the minority in the Supreme Court of Appeal was correct in its insistence that Baby R's best interests should not be mechanically sacrificed on the altar of jurisdictional formalism."

The expert report

[19] As indicated above, the court, in the urgent application, appointed the psychologist to investigate the minor child's best interest. After evaluating both parents and the minor child, the expert noted that in the circumstances of the minor child, it was important to design a regime that would ensure that he "attains psychological health and manages to develop constructive and fulfilling relationships with both parents." This observation is made in the context where it is clear from the papers and the expert report that there are parental issues that require attention, including, more importantly, the tension and conflict

⁴ (CA&R60/2017) [2018] ZAECGHC 74 (28 August 2018).

⁵ (CCT48/07) [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC) (7 December 2007).

between the minor child and the respondent. In this regard, the child reported to the expert "physical aggression on her part as well as his reported fear and anxiety to her." It should be mentioned that the same information was shared with the court by the minor child when he appeared in court. The expert correctly classified the respondent's behaviour as child abuse and illegal.

[20] It is important to note that at the time the expert conducted her assessment, the minor child was already at the boarding school in KZN. Following the findings made in the report, the expert recommended that:

- "1.1 (The minor child) should continue to attend boarding school at [...]. His secondary schooling should continue in the same vein at a suitable boarding facility.
- 1.2 . . .
- 1.3 (The Respondent) should have supervised contact with (the minor child) for at least one week of his school holiday and, at most, two weeks. This means that there can only be sleepover contact once the need for supervision is no longer there. The contact does not need to be exercised on consecutive days but can be arranged accordingly based on the availability of the various parties. This arrangement can be revisited given a further assessment of (the minor child's) best interest at the appropriate time.
- 1.4 A parenting coordinator should be appointed to assist (the Applicant and (the Respondent) in the resolution of any further disputes in the ongoing parenting of (the minor child). This individual should aid in alleviating any ongoing conflict and power struggles and facilitate the smooth implementation of parenting, contact and the best interest of (the minor child).
- 1.5 (The minor child) should commence with psychotherapy to assist him with his emotional and behavioural difficulties. A separate therapy space for himself

and (the respondent) may be necessary as well to assist in the remediation of their relationship.

1.6 Both (the Applicant and the Respondent) should attend parental counselling to assist them with developing appropriate and constructive parenting skills for (the minor child).

1.7 (The minor child's) involvement in non-gaming endeavours such as motocross should be supported and encouraged."

[21] The other expert's report that served before this court is that of Dr Hartzenberg, an educational psychologist. In the report, the expert found that the minor child lacked warmth in the home environment with the need to protect him from threats from the home environment. It was further found that the minor child had experienced interpersonal physical intimidation within the home environment.

[22] In my view, there is no case made to reject the opinions and the recommendations of the two experts. It is apparent from the information before this court that the home environment is not conducive for the minor child. The home environment is neither stable nor conducive for him, as required by section 7 (1) of the Act. I am thus in agreement with the opinion of Dr Fabbro that the best interest of the minor child is to allow him to remain and continue his schooling at the boarding where he is currently attending in KZN. This opinion is supported by the view of the minor child, who indicated in court that whilst there are some good boarding schools in Gauteng, his preferred choice is to remain at the KZN boarding school. According to him, it is an excellent school that satisfies his educational needs.

[23] I also find no reason to differ with the opinion of the expert that the primary residency of the minor child should remain with the applicant pending other processes recommended by the experts.

Order

[24] In light of the above, I make the following order:

1. Primary residency of the minor child will continue to vest with the applicant on the provision that the minor child shall continue to attend boarding school at Michaelhouse (KZN) and that the minor child's secondary schooling should continue in the same vein at a suitable boarding facility.
2. The Applicant will have contact as follows:
 - 2.1 Half of every school holiday.;
 - 2.2 Reasonable telephonic contact with the minor child and in accordance with the Rules of the school the minor child is attending via phone call and messaging and other methods of communication such as Skype and/or WhatsApp;
3. The Respondent will have supervised contact with the minor child as follows:
 - 3.1 Reasonable telephonic contact with the minor child and in accordance with the Rules of the school the minor child is attending via phone call and/or messaging and other methods of communication such as Skype and/or WhatsApp;

- 3.2 For at least one week of his school holiday and at most two weeks.;
- 3.3 No sleepover contact until such time that an expert has recommended otherwise;
- 3.4 The Respondent is liable to pay for the costs, if any, in relation to the aforementioned supervised contact;
- 3.5 The aforesaid contact does not need to be exercised on consecutive days but can be arranged accordingly based on the availability of the various parties;
- 3.6 The contact arrangement can be revisited given a further assessment of the minor child's best interests at the relevant time.
4. Any of the parties is entitled to appoint a parenting coordinator to assist in resolving any further disputes in the ongoing parenting of the minor child. The parenting coordinator should aid in alleviating any ongoing conflict and power struggles and facilitate the smooth implementation of parenting, contact and the best interests of the minor child. Both parties are obligated to partake in said process.
5. The minor child should commence and or continue psychotherapy to assist him with his emotional and behavioural difficulties.
6. Both the Applicant and Respondent should attend parental counselling. Each party is liable for their own costs in respect of same.
7. Each party is liable for his or her own costs.

E MOLAHLEHI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,
JOHANESBURG

Representation:

For the applicant: Adv C Spanenberg

Instructed by: Jasper van der Westhuizen and Bodenstein Inc

For the respondent: Adv V Jozi

Instructed by: A Nolte Attorneys.

Heard: 17 April 2023

Delivered: 27 June 2023.