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

DELETE WHICHEVER IS NOT APPLICABLE

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

4 September 2024

DATE

SIGNATURE

CASE NO: 2021-1368

In the matter between:

P[...] **K[...]**

Applicant

and

L[...]**K[...]**

Respondent

JUDGMENT

SEGAL AJ:

[1] This is the eleventh application in the pending divorce action between these parties who share a young daughter who is 5 years old and who has been the subject matter of much of the litigation. Unfortunately, the parties share an

acrimonious relationship and despite having obtained expert advice that the acrimony between them has a profound adverse impact their daughter, the hostility endures.

[2] This is an application in terms of Rule 43(6) which was enrolled on the urgent Family Court roll for the week of 29 July 2024. Notably, the application had been launched on 18 January 2024 and not proceeded with until the Applicant set it down on the Urgent roll (on two weeks' notice), on the basis that he had been advised that were he to have waited to move the application in the ordinary course, he would only be heard in approximately early to mid-October which is a significant period of time in life of a 5 year old and would amount to the minor child not being in the shared care of her parents for in effect the whole of term 3 of the school year. I must respectfully disagree.

[3] The Applicant contended further that urgency arises in that the parenting coordinator, (hereinafter referred to as "**the PC**") had impermissibly reduced his contact to the minor child, allowed no less than two of her directives to lapse and failed to produce a new directive or report despite promises to do so since 31 May 2024, moreover that she had failed in her duties and not fulfilled her role as PC. He contends that the services of a PC are no longer necessary.

[4] The Applicant avers that it is urgent that the minor child's contact to him be regulated by the PC's directive of 17 April 2024 and that what is known as a "3-2-2 regime" operate, whereby the minor child spends equal time with each parent on the basis that she spends three days with her mother, two days with her father, two days with her mother, three days with her father, two days with her mother, two days with her father, two days with her mother and so forth.

[5] Although a shared residence recommendation had emanated from the investigations and reports of two experts, it was to be phased in. The 2-2-3 regime was implemented from 9 April 2024 on a trial basis and then extended in May 2024 until the end of July 2024.

[6] There is a significant dispute of fact in relation to how the minor child coped

with the 3-2-2 schedule, the Applicant contending that it has worked very well and the Respondent contending that it has not.

[7] In support of this contention, the Respondent has cited numerous examples of the minor child having what is described as “melt downs”, screaming hysterically, kicking, spitting, biting, scratching, pulling the Respondent’s hair, crying at handovers at school, refusing to go to the Applicant after school, smacking the Respondent and behaving in a generally dysregulated fashion.

[8] It also emerged from the papers that there are completely different rules, structures and routines in the parties’ respective homes.

[9] The Respondent contends further that when the minor child is in the Applicant’s care, he alienates the minor child from her and places pressure on the minor child to express the view that she is in favour of the shared residence regime. It is alleged that the Applicant advises the minor child that she has to “save the day” otherwise “they would take her dad away”.

[10] These concerns have been raised and communicated by the Respondent to the Applicant, the PC and the minor child’s therapist.

[11] The minor child’s therapist has raised the concern that the minor child is exhibiting signs of psychological splitting which is considered to be a profoundly harmful defence mechanism.

[12] The Applicant appears to be disinterested in exploring the issues raised by the Respondent and referred to in paragraph 7 hereof, contending that the 3-2-2 arrangement should be reinstated immediately and the PC removed and not replaced.

[13] It was argued on the Applicant’s behalf that because the PC was appointed *inter alia* “to support the family in implementation of step-up phased-in system of contact” that even in the face of evidence that the minor child was not coping or that the arrangement was contrary to her best interests, the PC was not permitted to

reduce the contact. This argument cannot be correct. A PC's duty is first and foremost to the child and the service of that child's interests which are, paramount. To contend otherwise is inimical to the very purpose and function of a PC.

[14] There has been a complete breakdown in the relationship between the second PC and the Applicant. For various reasons which are not necessary for this court to canvass, the PC allowed interim directives to lapse and did not issue a new directive or provide a report as had been undertaken by her. The second PC directed that pending her further directive, the first PC's directive of June 2023 would remain in place. Unfortunately, after the elapse of some eight weeks, no further communication from the PC was forthcoming.

[15] There was similarly a complete breakdown in the relationship between the first PC and the Applicant, which ended in the Applicant having reported the first PC to her governing body.

[16] The Respondent contends that not only did the Applicant cause the first PC to withdraw (and report her), but he has also caused a host of difficulties and upsets with the second PC and additionally, she contends that he endeavoured to derail the minor child's therapy with Ms O'Mahoney and redirect it to a different therapist.

[17] Simply put, the Respondent argues that when experts, therapists and PC's do not do the Applicant's bidding, he threatens, intimidates, reports these persons which ultimately results in their removal from the role. This obviously redounds to the minor child's detriment.

[18] Although the papers are voluminous with affidavits, supplementary affidavits, reports and a plethora of other annexures, there is a golden thread that runs through the fabric of this litigation. Regrettably, it appears that when experts, PC's, therapists and the like take steps, form and express opinions, make recommendations or issue directives that are contrary to the Applicant's own views or his unmitigated desire to implement shared residence of the minor child at any cost, he adopts a hostile and combative approach in an effort to remove that person standing in the way of him achieving his objective.

[19] The function of a PC is an incredibly important one and although PC's are limited in the extent to which they may issue recommendations or directives (this varies from case to case), and are governed by *inter alia* the agreements reached between parties and the PC; court orders and established case law, PC's cannot be subjected to the negative consequences that flow from a party who does not agree with them or who is disgruntled.

[20] A PC is obliged to act in the best interests of the child and in so doing cannot be constrained to succumb to the direct or indirect pressure of the head strong parents who are invariably the very individuals who require parenting coordination in the first place.

[21] There is an unfortunate tendency in matters where PC's are appointed for parents who are unhappy with *inter alia* the pace of the process, the nature of the directives / recommendations, the views of the PC and the like, to adopt a course of conduct which completely undermines the parenting coordination process and/or emasculates the PC. This tendency circumvents the very purpose for which the PC has been appointed.

[22] It goes without saying that PC's must execute their duties diligently and this includes affording a hearing to both parties and considering their respective views, wishes and opinions, having regard to the views and opinions of third parties who are familiar with the child including *inter alia*, therapists and teachers.

[23] Moreover, PC's must not take their appointments lightly and must deal with matters timeously and diligently having regard to the sensitivity and urgency of each particular matter. PC's cannot be intimidated into a state of inertia because this ultimately compromises the interests of the child concerned.

[24] If parties are unhappy with a particular PC, they are obviously at liberty to approach the court for the PC's removal and in so doing, must provide a cogent basis in fact for such removal. It may well be that both parties are dissatisfied with the particular PC and that by agreement, they remove that PC and appoint an

alternate one. What cannot be countenanced is the type of carefully crafted and deliberate stratagem to oust the PC by creating unpleasantness, reporting to governing bodies and using other intimidatory tactics when the PC does not issue directives which accord with the desired outcome of a particular party. Simply put, disagreement *per se* does not constitute sufficient ground for the PC's removal.

[25] During argument I indicated that there is a need for a new PC to be appointed in this matter in light of the high conflict nature of the parties' relationship. When it became apparent that there had been a breakdown in the relationship between the Applicant and the second PC and I requested the parties to reach agreement on the identity of the potential third PC. The parties agreed upon Advocate Karen Green, who has indicated her willingness and availability to assume this role.

[26] With such appointment, checks and balances must be put in place, to ensure that the PC is able to perform her duties unhindered by threats of reporting, intimidation and interference. That having been said, the PC must perform her duties diligently and can in appropriate and legitimate circumstances be removed. I have provided for this in the order below.

[27] There is a clear need for an updated evaluation of the minor child in light of the concerning behaviour noted by the Respondent and the child's therapist but alas, the parties cannot agree on the identity of the appropriate psychologist to undertake this aspect. The Applicant proposes that either Nellie Prinsloo or Dr Ronel Duchen as they have both previously conducted investigations and assessments and produced reports.

[28] The Respondent is opposed to Dr Duchen as the appointed assessor for various reasons, none of which appear to be compelling. During argument I was advised that Dr Duchen is a witness in a criminal matter involving the parties but after argument I received correspondence confirming that Dr Duchen has no involvement at all in the criminal matter and that the submissions made to me on this score were devoid of merit.

[29] In the circumstances, it seems that given Dr Duchen's historic involvement in

the matter, the fact that the minor child has already met her and is familiar with her are all factors which militate in favour of Dr Duchen conducting a follow up assessment/ voice of the child assessment.

[30] No doubt Dr Duchen will focus only on the minor child's best interests and will not be rigidly assert her previous findings and recommendations which may, with the best will in the world, be incapable of implementation or require revision, refinement or adjustment.

[31] Dr Duchen was clear in her report, (to which I have had regard on Caselines), that the conflict between the parties and the high levels of acrimony and hostility could militate against a 3-2-2 regime. If this regime is not working, there are a host of alternate permutations of shared residence that could be considered.

[32] Ultimately shared residence does not always have to be structured in such a way that time is shared precisely 50% - 50% between the parties. It is far more important to have a happy, well-adjusted and thriving child than to slavishly count the minutes, hours and days and have a child who is unhappy, unable to cope and dysregulated. To offer up the child as a sacrifice on the alter of "equality" or the rigid adherence to a principle of a precise 50:50 time sharing arrangement is, to my mind not only ludicrous but an act of cruelty.

[33] It was also canvassed during argument that a possible reason for the difficulties in relation to the minor child's behaviour noted by *inter alia* the Respondent, could be that there are different rules, structures and routines in the parties' respective homes. These parties appear to have completely divergent parenting styles and approaches towards child rearing. During argument, I canvassed whether the parties could agree upon the identity of an expert to assist them with the alignment of their parenting.

[34] The parties agreed that Dr Mathilda Smit would assume this role and be jointly appointed. Hopefully Dr Smit will be in a position to not only assist the parties in relation to their individual parenting but to also provide skills to assist them in relating to one another in a manner that reduces the acrimony between them, and

which facilitates co-parenting.

[35] Although this application is important, it was not urgent. There is no reason why the matter could not have been enrolled for determination in the ordinary course, in circumstances where matters in this division can be heard within four to six weeks of requesting a date. If this were any matter other than one concerning the best interests of a minor child, I would have been inclined to strike the matter from the roll for non-urgency with an adverse order for costs.

[36] Insofar as the costs of this application are concerned, there is no good reason why the costs should not follow the result. The Applicant has been unsuccessful in reimplementing the 3-2-2 regime and in removing the PC. The Applicant's litigious propensities have caused the Respondent to incur extensive unnecessary costs in opposing 11 applications and in the circumstances, I shall make an appropriate order as to costs.

Accordingly, I make an order *pendente lite* in the following terms:

1. The Rule 43 Order granted on 24 October 2022 is varied as set out hereinbelow.

2. Paragraphs 1.4 to 1.7 (including subparagraphs) and paragraph 2 are deleted and substituted as follows:-

- 2.1. "1.4 With effect from the date of the grant of this order the Applicant shall be entitled to exercise contact to the minor child, V K, a girl born on 9 April 2019 ("the child"), as follows:

- 1.4.1 every alternative weekend from after school on a Friday until Monday morning when the Applicant shall take the child to school;

- 1.4.2 every Tuesday from after school until Wednesday morning when the Applicant shall take the child to school;

1.4.3 electronic/FaceTime contact once a day on the days on which the Applicant does not exercise physical contact with the child (the same shall apply to the Respondent when the child is in the Applicant's care);

1.4.4 on Father's Day, which shall include overnight contact on the night of Father's Day (with the same to the apply to the Respondent for Mother's Day);

1.4.5 for half of the available time on the child's birthday;

1.4.6 on the Applicant's birthday, with such contact to include overnight contact on the night of his birthday (with the same to the apply to the Respondent on her birthday);

1.4.7 for half of every long and short school holiday;

1.4.8 for half of Diwali;

1.4.9 for such additional contact as the parties may agree in writing."

2.2. "2.1 Advocate Karen Green is appointed as the Parenting Coordinator ("the PC") with the powers and duties attached to the order of Wepener J as Annexure "A" (Caselines 024-33 to 36 and 074-7 to 10). Both parties shall take all such steps and do all such things as are necessary to enable the PC to fulfil her duties and shall tender their full cooperation to the PC and permit her to follow such process as she deems meet without interference, threats or intimidation.

2.3. 2.2 In the event that Advocate Karen Green is unwilling or unable to assume / continue the role the role of PC, the parties shall request, in writing that the Chairperson of the Gauteng Family Law Forum nominate the PC, by which nomination the parties shall be bound.

2.4. 2.3 The PC may only be removed by:

2.3.1 order of Court;

2.3.2 agreement in writing between both parties;

2.3.3 tendering her resignation in writing together with her reasons for such resignation and her recommendations in relation to the furtherance of the matter in the child's best interests.

2.5. 2.4 The PC shall be entitled to increase or decrease the contact between the Applicant and the child as also, to restructure or reconfigure the contact in a manner which best serves the child."

It is also ordered as follows:-

3.

3.1. Dr Ronel Duchen shall conduct a follow up assessment / a voice of the child assessment and provide a report containing her findings to be delivered to the parties, the PC and the child's therapist, Claire O'Mahoney ("O'Mahoney"). Dr Duchen shall specifically consider the disputes regarding the minor child's conduct as set out in the papers filed of record and referred to in paragraph 7 herein.

3.2. The Applicant and the Respondent shall take all such steps and do all such things as are necessary to enable Dr Duchen to conduct her reassessment and shall tender their full cooperation to her and permit her to follow such process as she deems meet without interference, threat or intimidation.

3.3. In the event that Dr Duchen is unwilling or unable to assume these duties, then the parties shall in writing request that the Chairperson of the Gauteng Family Law Forum nominate an alternative expert to conduct a voice of the child assessment, by which nomination the parties shall be bound.

3.4. Upon receipt of the updated report and recommendations by Dr Duchen, the parties shall, with the assistance of the PC endeavour to agree upon the further contact of the Applicant to the minor child.

3.5. In the event that the parties are unable to reach agreement, then they are granted leave to file supplementary affidavits and to re-enrol this application for the determination of the issue of the minor child's residence and/or contact.

4. The minor child shall continue to have weekly therapy with O'Mahoney on such day and at such time as O'Mahoney may direct. Each party shall transport the child to and fetch her from therapy in alternate weeks.

5. In the event that the therapy falls on a day on which the transporting parent does not have contact to the child, the transporting parent shall immediately after therapy return the child to the home of the parent with whom contact vests on that particular day.

6. Neither party may influence the child by speaking about or to the other parent in the presence of the child or to any third party in unfavourable or negative terms. Neither parent may permit a third party to speak negatively of the other parent in the presence of the child.

7. The parties shall attend parenting therapy with Dr Mathilda Smit to assist them in advancing their parenting skills, aligning their parenting styles, structures and routines so that the minor child experiences consistency in the two homes.

8. The Applicant shall make payment of the costs of this application on the scale as between attorney and client, on scale C.

SEGAL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 4 September 2024

Heard on: 2 August 2024

Delivered on: 4 September 2024

Appearances:

J A Julyan SC:

S Clarence:

The Law Offices of Karen Olivier for the Applicant

T Ternet:

Kirshen Naidoo & Co Inc. for the Respondent