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

Case Number: 2023/132917

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 26/09/2024

SIGNATURE

In the matter between:

D[...] T[...], M[...] A[...]

Applicant

and

D[...] T[...], M[...]

Respondent

JUDGMENT

POSWA-LEROTHOLI A J

Introduction

[1] On 14 September 2022, the parties were divorced in terms of an order granted by the Randburg Regional Court under case number GPRAMRC 989/2022. The divorce incorporated a settlement agreement concluded by the parties on 22 February 2022. Clause 9 of the settlement agreement addressed the parental responsibilities and rights, whilst clause 10 set out the terms for contact with the minor children born of the marriage: M[...] D[...] T[...], a

daughter, born on 8 January 2011 and M[...] J[...] D[...] T[...], son, born on 19 September 2017 (“the minor children”).

- [2] In this application, the applicant seeks relief in two parts. In Part A, she asks that -

“The Chair of the Gauteng Family Law Forum is hereby requested to recommend and provide the names of 3 Psychologists with at least 15 years of experience in forensic matters involving disputes around care and contact of minor children, to be considered for appointment and to be instructed to conduct an investigation in relation to the best interest of M[...] D[...] T[...], a daughter, born on 8 January 2011 and M[...] J[...] D[...] T[...], a son, born on 19 September 2017, (“ minor children”) born from the former marriage between the Applicant and the Respondent, in respect of primary residency of the minor children and appropriate contact between the Respondent and the minor children, as well as any therapeutic assistance the children might need from a mental health care professional.”

- [3] The psychologist must submit a report with recommendations on the following:
- i. *“The home and/or living circumstances of the Respondent as well as his relationship with the minor children.*
 - ii. *The Respondent’s ability to take care of and provide for the minor children.*
 - iii. *The Respondent’s drug use and/or addiction history.*
 - iv. *The Respondent’s history of mental health concerns and any further recommendations in relation thereto.”*

- [4] At paragraph 6 of the Notice of Motion, the Applicant seeks interim relief pending the outcome of the forensic report; the suspension of clauses 9.3, 9.4, 10.1 and 10.2 of the settlement agreement.

“Interim primary residency of the parties minor children M[...] J[...] D[...] T[...] (“MJ”) and M[...] D[...] T[...] (“M[...])” is awarded to the Applicant, subject to the Respondent’s right to exercise contact

with the minor children every alternative weekend from the Friday after school to the Sunday at 17h00, when the Respondent shall return the minor children to the Applicant's care."

[5] In Part B the Applicant seeks:-

"That the primary residency of the minor children be awarded to the Applicant subject to the Respondent's right to reasonable contact with the minor children to be determined after the consideration of the recommendations of the psychologist."

[6] The Respondent opposes this application. However, having filed a notice of opposition in one matter, on 19 January 2024, he lodged a parallel application seeking full custody of both children in the Children's Court. The gist of the complaint was that MJ's asthma is exacerbated by the unhygienic conditions, at the applicant's house. The Respondent complained that the Respondent's inability to manage MJ's illness meant that he should no longer reside with the Applicant. The Children's Court dismissed the application on the basis that similar proceedings were pending before this Court.

Factual Background

[7] The parties were married to each other on 31 January 2015, the marriage was terminated by divorce, seven years later. The minor children are both born of the marriage. As a function of the settlement agreement concluded at the time of the divorce, the parties continue with the shared custody of the children. Thus, the children lived for one week with each parent during which time the other parent was allowed limited contact with the children.

[8] Clauses 9.3 and 9.4 of the settlement agreement provide:

9.3 Primary residence of the minor children shall be shared between the parties. The children to live with each party for a period of seven (7) days beginning on a Friday at 13h00 to the following Friday when the children are dropped off at school. This shall continue until such time as the primary residence is varied by agreement between the parties or by order of any competent

course or via the recommendation of the Family advocate's office.

9.4 *It is further agreed between the parties that on Tuesdays (or by agreement between the parties on any other day) that the party, not having residence of the children for that seven-day cycle, shall have contact with the minor children after school until 16h30 or from 16h00 to 19h00 and that party shall drop the children at the residence of the other party enjoying shared residence for that week."*

[9] Clauses 10.1 and 10.2 provide –

10.1 *The Plaintiff and Defendant agree that the parties enjoy shared residence of the minor children subject to clause 9(1) unless amended by agreement between the parties or by a court order of a competent court.*

10.2 *It is further agreed between the parties that on a Tuesday (or by agreement between the parties on any other day) that the party not having the children for that seven- day cycle shall have contact with the minor children after school until 16h30 or from 16h00 to 19h00 when that party shall drop the children at the residence of the other party enjoying shared residency for that week."*

[10] In essence, as at the time of divorce, the parties agreed that there would be no primary residence but custody would be shared between the parent's residences. It is common cause that this position remained until October 2023, when M[...], who is twelve years old, refused to spend the night at the Respondent's house. Consequently, M[...] primarily resides with the Applicant and only goes for day visits with the Respondent, the situation with MJ remains unchanged.

[11] In her founding affidavit, the Applicant sets out a detailed history of the relationship with the Respondent, as well as the relationship between the Respondent and each of the minor children. She spells out the grounds upon

which she asserts that circumstances have changed, necessitating amendments to the initial parenting plan.

[12] It is apparent that from the beginning, the relationship of the parties was characterised by revelry coupled with substance abuse. The Applicant contends that after the children were born she did not participate in the revelry however, the Respondent continued to do so, this inevitably led to the breakdown of the marriage. On 12 August 2021, the Applicant moved out of the matrimonial home with the two minor children and the Respondent went to a psychiatric hospital for a few days.

[13] The conflict between the parties continued and culminated in the Applicant seeking a protection order against the Respondent. The divorce proceedings commenced. The parties signed two settlement agreements before the dissolution of the marriage. The final settlement agreement dated 20 February 2022 was made an order of court. The divorce was finalised on 14 September 2022, incorporating the settlement agreement.

Issues

[14] Initially, the Applicant sought a specific psychologist to investigate and report on the relief sought. The Respondent vehemently objected to this. Finally, the parties have agreed that a third party should suggest three names of psychologists to conduct the investigation. Furthermore, the Respondent undertook to cooperate with the employment of the services of an independent psychologist. Thus, the only issue that remains, is whether the primary residence of the minor children, should be granted to the Applicant, pending the finalisation of the psychologists' investigation and report.

Submissions

[15] The parties advanced a variety of arguments in support of their contentions.

The Respondent and the minor children.

[16] The gravamen of the Applicant's complaints about the conduct of the Respondent in the care of the minor children are manifold:

- a. The Respondent consistently reneges on agreements reached with regard to the care of the children;
- b. The Respondent is inconsistent with the requirement to submit to tests before contact with the children.
- c. The Respondent has no permanent residence.
- d. The Respondent has consistently abused custody of the children by going beyond his rights. For example, by moving from place to place, taking them out of Gauteng without the Applicant's permission, and criticising her to the children.
- e. The purpose of seeking the psychologist's report is to ascertain the reasons M[...] no longer wants to sleep over at the Respondent's house and also to determine whether the current custody arrangement is suitable to the two minor children.

The Respondent and M[...]

[17] It is common cause that M[...] is born with learning disabilities and attends a special school. The relationship between M[...] and the Respondent has deteriorated. As a result, the services of a bonding therapist was sought in order to mend their relationship. The Respondent attended a few sessions and then reneged on the promise.

[18] The Respondent admits that he attended the bonding counselling with M[...] in order to mend their relationship. He attributes the breakdown in his relationship with M[...] to teenage rebellion and adolescence. As a result, M[...] no longer wants to sleep over at his house because he is a strict disciplinarian whereas the Applicant is more lenient.

[19] It is common cause that, in addition to the learning and adolescent issues, M[...] is not reliable as she has a tendency to fabricate and make serious allegations against both parties. Naturally, it is important that a third party investigates and determines the root cause of the change in attitude from M[...].

The Respondent's relationship with MJ

[20] M[...] J[...] ("MJ") also has health challenges in that he suffers from asthma. He relates very well with both parents and has expressed his wish to live with both his parents. The Applicant contends that, at six years old, MJ is too young to make this decision.

[21] The Applicant alleges that, the Respondent fails to consistently administer, the asthma medication on MJ. Whilst the Respondent accuses the Applicant of failing to provide an appropriate environment for MJ's respiratory challenges, by smoking in her presence and living in a house with mould.

The relationship between the minor children

[22] According to the Applicant, the minor children do not relate well and argue at the residence of the Respondent whilst there are fewer disputes under the care of the Applicant. Consequently, she asserts that the children must reside with her pending the outcomes of the psychologist report. The Applicant asserts that the separation causes instability in the manner in which the siblings relate. Thus, according to the Applicant, the current arrangement in which the children are separated, is not in the best interests of the children.

[23] The Respondent however, is content with the current arrangement.

The Law

[24] The effect of the interim relief sought by the Applicant is to suspend the custody order pending finalisation of the report by the psychologist.

The Best Interests of the Child

[25] Section 28 of the Constitution¹, stipulates:

"A child's best interests are of paramount importance in every matter concerning a child."

¹ The Constitution of the Republic of South Africa No.108 of 1996.

[26] The Children's Act² ("the Act") gives effect to this constitutional imperative, and is expressed in section 9 as follows:

"In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

[27] Section 6 of the Act, makes provision for the general principles, that must guide the interpretation and application of the Act. Pertinently, section 6(2) *inter alia* provides that:

'(2) All proceedings, actions or decisions in a matter concerning a child must -
(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation. . . .'

[28] Section 7(1) of the Act provides:-

7 Best interests of child standard

(1) 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;*

² The children's Act 38 of 2005.

- (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*
 - (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.*

(2) In this section parent includes any person who has parental responsibilities and rights in respect of a child.'

[29] Section 29 of the Act regulates court proceedings in applications brought in terms of certain provisions of the Act relating to parental responsibilities and rights agreements(section 22(4)(b)); the assignment of contact and care to interested persons by order of court section 23; the assignment of guardianship by order of court(section 24); persons claiming paternity (section 26(1)(b)) and the termination, extension, suspension or restriction of parental rights and responsibilities (section 28).

[30] Relevant to this application, is section 22(4)(b) which provides as follows:

'22 Parental responsibilities and rights agreements

. . .

- (4) Subject to subsection (6), a parental responsibilities and rights agreement takes effect only if -*

. . .

(b) made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement.'

[31] Section 22(6) provides-

"(a) ...

(b) A parental responsibilities and rights agreement that was made an order of court may only be amended or terminated on application-

(i) by a person having parental responsibilities and rights in respect of the child;

(ii) by the child, acting with leave of the court; or

(iii) in the child's interest by any other person, acting with leave of the court."

[32] Section 29(5)(a) provides:

"(5) The court may for the purposes of the hearing order that-

(a) a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court;"

[33] From the above, it is evident that section 29 confers jurisdiction upon this court the power to adjudicate disputes relating to parental rights and responsibilities. In terms of section 22(6), a party seeking relief in terms of section 22(4) must be persons who have an interest in the minor child or the minor child itself with the leave of court.

[34] In this matter, the Applicant satisfies the requirements as she is a person who already has parental rights and responsibilities. She also seeks to amend the agreement relating to parental rights and responsibilities that has been made an order of court.

[35] Is it in the best interests of the minor children that the shared custody arrangement agreed to in the settlement agreement should be suspended

pending the finalisation, of the psychologist's report? I believe not. There is insufficient evidence to suggest that the Respondent is not able to provide a stable and nurturing environment for MJ in particular. It is evident from the pleadings that MJ enjoys a strong, positive and special bond with the Respondent. Despite his young age, he has expressed his wish to live with both parents. The current arrangement seems to suit him well. It would be important not to interfere with the current arrangement in order to ensure stability and continuity in MJ's life.

[36] With regards to M[...], the nature of her relationship with the Respondent is complex and may very well be ascribed to adolescence as alleged by the Respondent. However, the other factors relating to her emotional needs will be properly assessed by the psychologist. are best suited to be met by the Applicant. She has expressed her preference to have her primary residence with the Applicant. As a girl of 12 years, I believe she is mature enough to express a reasoned opinion. It would seem that she believes the Applicant will meet her physical and emotional needs as well.

[37] It is common cause that the parties have already changed the custody arrangement before approaching the courts and it is workable. I do not believe there is a need to interfere with it. The parties have demonstrated co-parenting a willingness to support the minor children. I believe this can be sustained until the report from the psychologist is issued.

[38] The Respondent has made an undertaking to submit to the relevant tests when the minor children are in his care.

Conclusion

[39] In the final analysis, and considering the overarching standard of the best interests of the child. I do not believe that sufficient reason exists to interfere with the current custody arrangement.

Order

[40] In the result, an order is granted in the following terms:

1. The Chair of the Gauteng Family Law Forum is hereby requested to recommend and provide the names of 3 Psychologists with at least 15 years of experience in forensic matters involving disputes around care and contact of minor children, to be considered for appointment and to be instructed to conduct an investigation in relation to the best interest of M[...] D[...] T[...], a daughter, born on 8 January 2011 and M[...] J[...] D[...] T[...], a son, born on 19 September 2017, (“ minor children”) born from the former marriage between the Applicant and the Respondent, in respect of primary residency of the minor children and appropriate contact between the Respondent and the minor children, as well as any therapeutic assistance the children might need from a mental health care professional.
2. If the parties cannot agree on a psychologist from the aforementioned recommendation list, the psychologist with the most cost-effective quotation will be appointed to conduct the investigation.
3. The abovementioned appointed psychologist is hereby further instructed to upon completion of her investigation to prepare a report and recommendations in respect of the best interest of the minor children as aforementioned, with specific reference to be made to:
 - 3.1 The home and/or living circumstances of the Respondent as well as his relationship with the minor children.
 - 3.2 The Respondent’s ability to take care of and provide for the minor children.
 - 3.3 The Respondent’s drug use and/or addiction history.
 - 3.4 The Respondent’s history of mental health concerns and any further recommendations in relation thereto.

4. The Respondent is hereby compelled to co-operate with the psychologist and to subject himself to random drug testing at the request of the social worker.
5. The costs of the appointed psychologist are to be paid equally by the Applicant and Respondent.
6. Pending the outcome of the aforementioned investigation of the psychologist paragraphs 9.3 and 9.4, 10.1 and 10.2 of the settlement agreement which was made an order of court by the Randburg Regional Court on 14 September 2022 under case number GPRANRC 989/2022 hereby varied in the following terms:
 - 6.1 Interim primary residency of the parties minor child M[...] D[...] T[...] ("M[...]") is awarded to the Applicant, subject to the Respondent's right to exercise contact with the minor children every alternative weekend from the Friday after school to the Sunday at 17h00, when the Respondent shall return the minor children to the Applicant's care.
 - 6.2 The custody and contact in respect of **M[...] J[...] D[...] T[...]** shall remain unchanged.
 - 6.3 The remainder of all other telephonic contact provisions to remain in force and effect.
7. Upon receipt of the report and recommendations of the psychologist the Applicant shall have 10 days to duly supplement her papers and thereafter the Respondent shall have 10 days to supplement his papers, whereafter the matter will be set down for an Order in terms of part B of the Notice of Motion or any counterclaim thereto.
8. The relief sought in Part B of this Notice of Motion is postponed sine die.

9. Costs of this application shall be paid by the Respondent.

**Poswa-Lerotholi AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 of the judgment is deemed to be **25 September 2024**

COUNSEL FOR THE APPLICANT: Adv G
Olwagen-Meyer
INSTRUCTED BY: RIVA LANGE ATTORNEYS
COUNSEL FOR THE RESPONDENT: In Person
DATE OF ARGUMENT: 20 August 2024
DATE OF JUDGMENT: 25 September 2024

