



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN**

Case No: 1702/2018

In the matter between:

V[...] D[...] S[...]: D[...] J[...]
(ID No: 7[...])

Applicant

and

W[...] M[...]
(ID No: 8[...])

Respondent

In re:

V[...] D[...] S[...L[...]
(BORN 02/08/2009 A GIRL AGED 14)

The Minor Child

V[...] D[...] S[...M[... E[...]
(BORN 31/10/2011 A GIRL AGED 12)

The Minor Child

JUDGMENT

Introduction

[1] This is an opposed application to amend and vary a Consent Paper and Parental Responsibilities and Rights Agreement, which was incorporated in a Decree of Divorce granted by this Court on 09 March 2018. The relief sought specifically pertain the defined rights of contact to the parties' two minor children, both girls; L[...] V[...] D[...] S[...] ("L[...]"), born on 02 August 2009, currently aged 15 years; and M[...] E[...] V[...] D[...] S[...] ("M[...]"), born on 31 October 2011, currently aged 12 years ("the children"). The Applicant also seeks an amendment to his liability to pay the children's medical expenses.

Genesis of the Application

[2] The primary purpose of the application is predicated on the ostensible difficulties experienced by the Applicant insofar as it relates to the implementation of the existing contact provisions in the Parenting Plan.¹ A number of instances were illuminated to demonstrate the purported pattern of frustration, allegedly engineered by the Respondent to hinder the Applicant's contact with the children.

[3] It is the Applicant's contention that the proposed amendment to the Parenting Plan will serve to eliminate constant negotiations between the parties. It was furthermore submitted that the children will have a routine and set schedule in place

¹ The existing provisions:

Ad Contact and Care

(a) Both parties will have contact with the children during the week and on weekends, having due regard to their scholastic, social and extramural commitments, their age, and development and, in general, their best interest, which contact will be arranged by agreement between the parties and failing agreement as determined by the facilitator.

(b) School holidays will be determined by agreement between the parties at least 30 days prior to the commencement of a school holiday, and failing agreement, as determined by the facilitator.

(c) The number of public holidays is to be shared equally between the parties. Where possible, public holidays falling on a Monday or Friday during school terms will attach to a weekend.

Ad children's medical care

(a) The parties shall notify each other of any illness or medical or other problems experienced by the children when they are in their respective care save in the event of an emergency when the other Party shall be advised thereof.

which would be in their best interests. The proposed amendment will ultimately afford the Applicant less time contact times with the children.

The Relief Sought

[4] The salient terms of the relief sought by the Applicant includes *inter alia*:

(a) Contact on every alternative weekend:

1. The Applicant is to collect the minor children from the Respondent's residence at 18h00 on Friday afternoons, alternatively, by the Applicant's appointed nominee;
2. The Applicant or his appointed nominee is to return the minor children to school on Monday mornings.

(b) Every non-alternative week:

1. The Applicant or his appointed nominee to collect the children on Wednesdays at 18h00 at the Respondent's residence;
2. The Applicant or his appointed nominee is to return the minor children to school on a Thursday morning.

(c) Alternative relief:

1. The Applicant seeks that the application be postponed *sine die* for the Family Advocate, alternatively, an independent child psychologist be appointed to conduct an urgent investigation as to the minor children's best interest, more specifically, Applicant's care and contact rights as set out in the Updated parenting Plan and to report back to the Court;

(d) That should the matter be adjourned; the court grants an interim order on the same terms that the Applicant seeks in the main relief.

[5] The Respondent seeks an order that the application be dismissed with costs, save for the alternative relief sort for the appointment of an Independent Clinical Psychologist, which appointment should be at the Applicant's costs.

Grounds of opposition

[6] The Respondent opposes the application on a number of grounds which included *inter alia*, that there are disputes of fact; the application is premature; that no case is made out in the founding affidavit for the contact relief sought; that the children's voices are silent and the Applicant's refusal to agree to an expert assessment.

Premature Application

[7] In light of the conclusion to which I have come, I do not deem it necessary to deal with every aspect challenged in this application as there is a glaring initial hurdle which the Applicant has failed prove, namely whether he is entitled to approach this court to vary the Parenting Plan, in circumstances where the internal remedies contained in the Parenting Plan were not exhausted. In this regard, the Parenting Plan makes provision for the resolution of disputes which is couched in peremptory terms:

‘ ...

2.1 The parties record that it is their intention that all matters pertaining directly to the interests of the children they will attempt to resolve the disputes firstly between themselves and failing which to attempt to resolve the disputes through the Parent Plan Collaborator before referring the dispute to the facilitator. An attempt will be made to resolve all financial disputes firstly between the parties and failing agreement to refer the dispute directly to the facilitator. In this regard the parties have appointed Leigh Pettigrew as their Parent Plan Collaborator.

2.2 ...

2.3 ...

2.4 *In the event of the parties being unable to reach agreement as to the identity of the Parent Plan Collaborator, then either party can approach the chairperson of FAMAC to appoint such a professional for ...*

2.5 ...

2.6 *If the parties are unable to reach agreement on any issue where a decision is required in respect of the children or on an issue concerning the children's welfare which has become contentious, the dispute shall first be referred in writing to the Parent Plan Collaborator who shall attempt to resolve the dispute as speedily as possibly without recourse to litigation...*

2.7 *If the parenting Plan Collaborator is unable to resolve a dispute by way of collaborative processes, he/she will refer the parties to the facilitator for facilitation. The facilitator shall be authorised to issue a directive which shall be binding on the parties subject to the provisions herein' [Emphasis Added]*

[8] The appointed Parent Plan Collaborator, Leigh Pettigrew ("Ms Pettigrew"), fell by the wayside, however, clause 2.4 provided a mechanism to be followed to appoint a Parent Plan Collaborator. Either of the parties were therefore at liberty to approach the Chairperson of FAMAC to appoint another professional. Clause 2.6 of the Parenting Plan furthermore makes it peremptory that the parties are to first refer a dispute in writing to the Parent Plan Collaborator who is mandated through this provision to attempt to resolve the dispute speedily without recourse to litigation. In my view, when Ms Pettigrew fell away, this ought to have been addressed by either of the parties, or jointly, with the assistance of FAMAC. This was not done, which left a lacuna pertaining to dispute resolution engagements with the Parent Plan Collaborator as envisaged in the Parenting Plan.

[9] It is common cause that the parties engaged Advocate Diane Davis (“Advocate Davis”) who was appointed as the facilitator. In this regard, Advocate Davis was engaged to assist the parties with only 2 limited issues, namely the concerns around the Applicant’s alcohol consumption and when L[...] had to be placed on certain medication for her medical condition.

[10] All unresolved disputes fall within the purview of the facilitator’s duties and functions, yet only 2 disputes were referred to Advocate Davis. Clause 2.7 authorises the facilitator to issue directives which shall be binding on the parties. The facilitator is therefore given tremendous powers which are binding on the parties. Furthermore, clause 3.4 of the Parenting Plan is of pivotal importance as it stipulates that:

‘Neither party may initiate Court proceedings for the removal of the facilitator or to bring to the Court’s attention any grievances regarding the performance or actions of the facilitator without first meeting and conferring with the facilitator in an effort to resolve the grievance...

Issues concerning the children’s best interests, including as provided for in paragraph 1.4 above, and after the parties have consulted with the Parent Plan Collaborator referred to in (2) above, the dispute shall be formulated in writing and referred to the facilitator who shall attempt to resolve the dispute by way of mediation / facilitation as speedily as possibly and without recourse to litigation...

[11] Advocate Davis remains the appointed facilitator. It is clear that no grievance regarding her performance or actions have been noted. It is furthermore clear that the dispute(s) pertaining to the Applicant’s frustration in relation to contact could have and should have been referred to Advocate Davis as she is cloaked with the authority to mediate disputes in an attempt to resolve such disputes speedily and without recourse to litigation.

[12] Consequently, I am not persuaded that the internal remedies have been exhausted. In any event, it is manifest that the Parenting Plan does not envisage recourse to litigation. Dispute resolution is the preferred manner in which to resolve

concerns pertaining to children. Litigation is a measure of last resort if regard is had to Section 6(4)(b) of the Children's Act² which provides that in any matter concerning a child, an approach which is conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided.

[13] The Applicant has provided no cogent reasons why the existing dispute resolution procedures in current Parenting Plan were not invoked. There is a plethora of case law that obliges parties to resolve disputes by way of mediation in a Parenting Plan before approaching a court.³ It is only once reasonable efforts have been made by the parties that the intervention of a court should be sought. I am therefore of the view that the Applicant's application is premature, and falls to be dismissed on this ground alone.

Further considerations

[14] It is trite that the Applicant bears the onus to prove on a balance of probabilities, that the proposed variation to the current Parenting Plan, is in the best interests of the children as enunciated in the seminal judgment of **McCall vs McCall**⁴ :

'Insofar as the interests of the child provide the criterion by which the court's decision is to be made, the onus is perhaps a less decisive factor that is ordinarily the case, but in my view, that onus rests on the non-custodian parent, here the applicant, to show that the present situation is detrimental to the children's interests and that a variation of the custody arrangement would be in the child's advantage.'

[15] There were a number of issues in dispute identified by the Respondent. The matter of **P v P**⁵ is instructive on the court's approach, where Rogers J (as he then was) remarked as follows:

² Act No. 38 of 2005.

³ See *PD v MD* 2013 (1) SA 366 (E) at para 24

⁴ 1994 (3) SA 201 (C) H-L.

⁵ [2020] 2 All SA 587 (WCC) at para 71.

'The court a quo cited B v S supra at 585C-E and T v M 1997 (1) SA 54 (A) at 57J-58B for the proposition that in proceedings of the present kind a court should be slow to determine facts by way of the usual approach adopted in opposed motions, ie by the Plascon-Evans rule. The learned judge did not, however, explain how she intended to resolve disputed factual matter. What the above cases show is that where, in determining a child's best interests, it is necessary to resolve one or more factual disputes, the court should always consider the desirability of hearing oral evidence rather than having recourse to the Plascon-Evans rule. However, if the trial court elects not to hear oral evidence, the Plascon-Evans rule must be applied. The trial court is not at liberty to resolve the facts by assessing the probabilities on paper. A parent's version can in such circumstances only be rejected if it is so far-fetched or untenable that it can be dismissed out of hand without further investigation.'

[16] In light of the earlier finding by this court, the resolution of the identified dispute(s) ought to be dealt with by way of the internal procedures provided for in the Parenting Plan. This Court heeds to the caution in **P v P** (*supra*), that it is not desirous to resolve these disputes in the conventional manner by applying the legal principle distilled in the Plascon Evans Rule. While the Applicant holds the view that there are a number of issues that the parties are in agreement with, it is apparent that the pleadings are replete with denials and challenges on certain averments by both the Respondent and the Applicant.

[17] This court has a measure of understanding to the Applicant's plight insofar as certainty and planning is concerned. The anecdotes provided by the Applicant of past cancellations and rearrangement of holiday plans are indicative of his concerns. The Applicant's approach to this Court for more structured contact, appears to be anchored in the belief that the December 2024 holiday plans may be disrupted. However, the existing Parenting Plan specifically provides that school holidays will be determined by agreement between the parties at least 30 days prior to the commencement of a school holiday, and failing agreement, as determined by the facilitator. There is therefore a built-in resolution conduit in the Parenting Plant whereby the facilitator's assistance to mediate the upcoming holiday plans could be sought. This further cements the Court's earlier conclusion that the application is

premature and that the Applicant ought to have taken up this dispute with the facilitator, which he has not done.

[18] It is furthermore apposite to state that the Parenting Plan makes it peremptory for each parent and the children (if necessary) to participate in the dispute resolution process as requested by the facilitator.⁶ The participation of the children become crucial in matters concerning them. Moreover, effect must be given to the Constitutional imperative which provides that a child's best interests are of paramount importance.⁷ The Children's Act⁸ entitles every child in any matter relating to the child to participate in an appropriate way.⁹ The child's view must be given due consideration. This is underscored by Section 31 of the Children's Act, which pertinently states:

'(1)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.'

[19] The children *in casu* are of an age where they can articulate their views. An imposition of an arrangement for them and on them, at their respective ages, without securing their proverbial buy-in, may not necessarily yield the results envisaged by the Applicant. Dangling the carrot of "less contact" proverbially speaking does not persuade this court that the structured contact proposed by the Applicant, will be in the children's best interest. Consequently, in the absence of the children's participation, this Court cannot consider the proposed variation of Parenting Plan, and as such, the interim relief sought by the Applicant falls to be dismissed.

[20] There was much contestation by the Appellant, regarding further expert assessment by an Independent Psychologist. It is imperative for a party, before approaching a Court to vary the provisions of a Parenting Plan, to engage the

⁶ Parenting Plan, para 3.8, page 92.

⁷ Constitution of the Republic of South Africa, Act 108 of 1996, Section 28.

⁸ Act 38 of 2005.

⁹ Section 10 of the Children's Act.

services of a suitably qualified person to provide guidance as to what is in the best interest of children. In this regard, the following was held in **VN v MD**¹⁰ :

‘...By parity of reasoning, where the parenting plan is to be varied by virtue of the parties experiencing difficulty in exercising their rights and responsibilities, the parties are again required to engage the services of such qualified person before seeking the intervention of a court. This is particularly so where a significant period has elapsed since the previous parenting plan had been endorsed and where the parties have failed to reach agreement.’

[21] The Respondent contended that there was no need for the Applicant to approach this Court for an order that either the Family Advocate or an Independent Psychologist conduct the assessment, even in the alternative. In any event, the mere fact that such a request has been made, is indicative that the Applicant recognises that the relief he seeks cannot succeed without an assessment. The irony is further underscored by the request that such appointment be done urgently. A significant time has lapsed since the previous Parenting Plan was made an Order of Court. It follows, that this Court cannot be expected to rubber stamp the proposed variation to the Parenting Plan, without proper investigations by the appropriate experts on whether the proposed variation will be in the best interest of the children.

[22] Insofar as the proposed amendment to the medical expenses is concerned, the Applicant seeks an order that he pay for the children’s reasonable medical expenses with the proviso, that his written consent be obtained prior to any medical expenses being incurred, which is not covered by this medical aid scheme or in instances where such medical expenditure requires pre-authorisation. Should the Respondent fail to obtain the Applicant’s consent, she will be liable for the said medical expense.

[23] The Applicant complains that the Respondent does not consult with him before appointing therapists. On his own version, he has consented to every therapist and has met with seven of the children’s therapists. He has also attended sessions with them and the children. The Applicant has also recognised the children’s need for emotional and Psychological support.

¹⁰ 2017 (2) SA 328 (E) at para 19.

[24] In considering the matter in its entirety, I find that the Applicant has not made out a proper case for the relief he seeks in relation to the amendment to the medical care provision. Regardless hereof, it is evident that the parties ought to have attempted to resolve this dispute as well by way of the internal dispute resolution remedies as previously dealt with in this judgment.

Conclusion

[25] It is palpable that the children are loved and well taken care of by both the Applicant and the Respondent. I have no doubt that both parties have the children's best interests at heart; however, it is my view, that the ongoing discordance between the parties are counter-productive to the well-being of the children.

[26] The Parenting Plan created internal mechanisms by which the parties are enjoined to resolve disputes amicably. The parties are encouraged to attempt to resolve the disputes in the conciliatory manner envisaged in the Parenting Plan by embracing the alternative dispute resolution procedures set out therein, in an effort to achieve the best outcome for the children, which will ultimately serve their best interest.

[27] Not only has the Applicant elected to approach this Court for relief, prematurely without exhausting the extant provisions in the Parenting Plan, he has also failed to discharge the onus that the proposed variations to the Parenting Plan will be in the best interest of the minor children. The voices of the children are glaringly silent. These are, in my view, fundamental flaws in the Applicant's application that cannot be ignored and for all these reasons, the application cannot succeed.

[28] At the commencement of the proceeding the Court was informed that the parties have agreed to appoint Craig Schneider, to act as the Parenting Coordinator, who will conduct an investigation as to what contact arrangements between the children and the Applicant are in the children's best interests. It is my view that this is a sensible approach.

[29] I pause to mention that the agreement reached between the parties, in this regard, does not amount to the Applicant achieving success in this application as there were numerous previous attempts by the Respondent that an Independent Psychologist be appointed to conduct an assessment on the children. I therefore do not deem it necessary to adjourn the matter *sine die* as Craig Schneider has been identified as a Parenting Co-ordinator and his powers and functions have been agreed to by the parties. There is therefore no live issue for adjudication at this stage in light of the fatal defects identified in the application. I am satisfied that the existing arrangements in respect of the minor children as set out in the prevailing Parenting Plan will continue to serve their best interest. Once the Psychologist report has been provided to the parties, they shall be at liberty to consider their further recourse, if necessary.

Costs

[30] Generally, our courts do not wish to discourage parents from acting in what they believe to be in the best interest of their children. The matter of ***Bethell v Bland and Others***¹¹ provides useful guidance to the approach on costs in matters concerning children. In this matter the Court held that generally a successful litigant is entitled to costs. No matter how *bona fide* and concerned a party may be, it is unfair that a person who is drawn into litigation and who successfully resists it should have to pay the cost of being involved.

[31] In *casu*, although the Applicant's application was primarily premised on regularising contact with the children, it was materially flawed for reasons already stated. Although the Applicant suggested that the costs of an Independent Clinical Psychologist be shared between the parties, it is my view that such costs should be borne by the Applicant, given the numerous prior attempts by the Respondent to persuade the Applicant to appoint an expert to conduct an assessment as to the best interest of the children. Therefore, I am of the view that this application could have been avoided. Consequently, the Applicant cannot avoid the inevitable consequence that costs must follow the result.

¹¹ 1996 (4) SA 472 (WLD) at 475E – I.

[32] It is trite that Rule 67A of the Uniform Rules requires that party and party costs in the High Court be awarded on one of three scales. The scales set a maximum recoverable rate for work having regard to the importance, value and complexity of the matter. The amendment to the Rule applies prospectively.

[33] After carefully considered the complexity of the matter, its value and importance to the parties, in the exercise of my discretion, I am of the view that costs on Scale C are justified.

Order:

[34] In the result, the Court, after having heard counsel for the Applicant and Counsel for the Respondents, and having read the papers filed of record make the following orders:

1. An Independent Clinical Psychologist, who shall be agreed between the parties, together with the assistance, if necessary, of the parties' jointly appointed Parenting Co-ordinator, Mr Craig Schneider, shall be appointed, as soon as possible, to conduct an investigation as to what contact arrangements between the children and the Applicant are in the children's best interests.
2. The costs of the Psychologist's investigation and report shall be paid by the Applicant.
3. Save for the aforesaid, the application is dismissed with costs on scale C.

P ANDREWS, AJ
Acting Judge of the High Court
Western Cape Division

APPEARANCES

For the Applicant:

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Date of Hearing: 13 September 2024

Date of Judgment: 16 September 2024

NB: The judgment is delivered by electronic submission to the parties and their legal representatives.