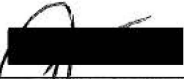


REPUBLIC OF SOUTH AFRICA



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

Case Number: 2020/40619

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
11/12/2024.	
DATE	SIGNATURE

In the matter between:

JK

Applicant in reconvention

and

JK

Respondent in reconvention

JUDGMENT

- [1] The applicant in reconvention (the husband) and the respondent reconvention (the wife) were formerly married. One child was born of their marriage, namely L who is at present 10 years of age.
- [2] Primary residence of L was at the time of the grant of the decree of divorce awarded to the wife. The husband was granted rights of contact to L. These matters were regulated by a consent paper which the parties had concluded.

- [3] Difficulties arose and consequent thereon the wife instituted an urgent application against the husband. She in that application sought to modify the contact which the husband exercised in relation to L. The substance of the case was that the husband had formed a relationship with one Cheney (C) . C is the mother of a child (DB) and the suggestion was that L was being bullied by DB and because of that the husband's contact to L required modification.
- [4] Windell J considered the matter and after hearing the parties she, on the 8 December 2020, issued an order in the following terms:-

- "1. *Pending the finalisation of the interactional analysis and further counselling and parental guidance counselling, prescribed by Social Worker, Marlize Holtshauzen as well as further steps taken in terms of paragraph 5 of the Settlement Agreement, annexed to the Order of Court, dated 29 August 2019 in case number 2016/44604:*
 - 1.1 *The Respondent is allowed to exercise his contact in terms of paragraph 3.1 and 3.3 of the Settlement Agreement in case number 44604/16, subject to paragraph 2 infra.*
 - 1.2 *For the December 2020 holiday the Respondent is allowed to take the minor child for the period 24 December 2020 to 31 December 2020 (both dates included) to visit his parents in Uniondale, subject to paragraph 2 infra.*
 - 1.3 *Further contact, should it become applicable, in terms of paragraph 3.4, 3.5 and 3.6 of the Settlement Agreement in case number 44604/16, shall also be subject to paragraph 2 infra.*
2. *At all relevant times when exercising his contact the Respondent shall not allow the minor child to have any contact whatsoever with the Respondent's friend, (C), and/or her minor son, (DB).*
3. *Both parties are ordered to comply with any reasonable request of the registered Social Worker, Marlize Holtshauzen are further ordered to cooperate with her and other practitioners or experts appoints by her in order to give effect to paragraph 9.2 of Holtshauzen's report dated 20 November 2020.*
4. *Both parties are authorised to file further papers, should it appear after the process, guided by Holtshauzen, that it is necessary to apply for alternative/further relief pertaining to the minor child.*
5. *Costs for the Application on 8 December 2020 are reserved."*

- [5] Ms Holtshauzen commenced the work entrusted to her under paragraph 1 of the order of Windell J. The husband and wife however subsequently agreed that she

would be replaced by Ms Sonia Howes, a psychologist. She in terms of the parties' agreement was to discharge the functions which had previously been entrusted to Ms Holtshauzen.

[6] It appears that the husband's relationship with C had by then come to an end and that both she and DB no longer formed a part of the husband's life.

[7] Ms Howes on 2 June 2022 submitted a "Holistic Social Emotional Screening Assessment Report" in respect of L to the parties. She in the report expressed the view that *"(O)ut of the assessment data it would appear that the minor child wasn't exposed to bullying behaviour by (DB)."*

[8] The husband then instituted a counter-application in the earlier proceedings, seeking an order of shared residency in respect of L.

[9] The counter-application was ill-fated to begin with. An investigation by the Family Advocate had neither been sought nor obtained. This was recognised by the parties who agreed that the counter-application could not be determined until such time as that omission had been cured.

[10] The parties then furnished me with draft orders in regard to the further conduct of the matter.

[11] The competing drafts held much in common. There, are however, three residual questions which I need to determine. They relate to the following, namely:-

- whether the order of Windell J is to be retained and incorporated in the draft which I have been asked to make an order of court;
- what is to happen to the costs of the proceedings before Windell J;
- what is to happen to the costs of the proceedings before me on 5 and 6 December 2024

[12] I shall deal with each of these matters *seriatim*.

[13] Mr Jacobs on behalf of the husband contends that the order of Windell J ought to be incorporated in the order which I am to make and that effect is to be given

to that order in its terms. This was resisted by Ms Salduker who appeared on behalf of the wife. I am not inclined to accede to the request of Mr Jacobs. The proceedings before Windell J related to the issues surrounding the husband's contact to L in light of the allegation that he was being bullied by DB, the son of his then girlfriend, C. This issue has seemingly been resolved, at least on the face of it. The Family Advocate in conducting his or her investigation will prescribe what procedure needs to be followed in order to determine whether it is in L's best interest that his primary residence be shared by the husband and the wife. Some of these procedures may overlap with what Windell J ordered in relation to the investigations which she sanctioned. In my judgment it would be most unwise to fetter the Family Advocate's discretion and approach by retaining the order of Windell J. This order related to a specific problem which had arisen. The investigation now in contemplation relates to an entirely different problem.

- [14] The costs of the proceedings before Windell J were reserved. I have no reason to suppose that the wife in instituting those proceedings and the husband in resisting them acted in manner other than which represented the best interests of L. Despite Ms Holtshauzen's apparent vindication of the husband's position, I believe it proper that the parties should bear their own costs of these proceedings.
- [15] The husband's counter-application was entirely misconceived. There was no prospect that it would be heard without a forensic investigation by the Family Advocate. The wife's attorneys pointed this out to the husband's attorneys. He nonetheless persisted with the application. In so doing the husband in my judgment acted unreasonably. In result I am of the view that the wasted costs arising from the hearings during the week commencing on 2 December 2024 are to be paid by the husband on scale B of the scale referred to in Uniform Rule of Court 69(A).
- [16] Based on the drafts of the parties and my views on them, I make the following order:-
1. The matter is referred to the Office of the Family Advocate for an investigation and recommendation as to whether it is in the best interests of

the minor child, L to enjoy shared residency with the applicant and respondent.

2. Pending the recommendations of the Office of the Family Advocate, the respondent is allowed to exercise unrestricted contact in terms of the existing settlement agreement under Case Number 44604/2016.
3. The order previously granted by the Honourable Judge L Windell on 8 December 2020, with regard to the prohibition of the contact between L and C and DB is hereby set aside.
4. The applicant and the respondent are to co-operate with the investigations of the Family Advocate.
5. The applicant and respondent are granted leave to supplement their papers once the report of the Family Advocate has been tabled.
6. There will be no order for costs arising from the proceedings under case number 2020/40619, which proceedings were determined by the Honourable Judge L Windell on 11 December 2020.
7. The costs of the hearings before me during the course of the week commencing 2 December 2024 are to be paid by the respondent.


G FARBER A J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the applicant in reconvention:

Instructed by:

Adv G Jacobs

Nolte Inc Attorneys

c/o Couzyns Incorporated

4th Floor

One Sturdee

1 Sturdee Avenue

Rosebank

Tel: 011 788 0188

For the respondent in reconvention:

Instructed by:

Adv A Salduker

Verster Attorneys

Unathi House

545 Rubenstein Drive

Moreleta Park

Tel: 012 030 0019