

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 2023-076055

(1) **REPORTABLE:**

(2) **OF INTEREST TO OTHER JUDGES:**

(3) **REVISED:**

In the matter between:

R[...] S[...]

Applicant

and

S[...] S[...]

Respondent

JUDGMENT

Kumalo J

INTRODUCTION

[1]. In this matter, the Applicant seeks an order, *pendente lite*, to vary and replace paragraph 3 of Moorcroft AJ dated 17 August 2023, in accordance with the recommendations made by the jointly appointed expert, Ms. L Hening.

[2]. The Respondent opposes the application and has filed his own counter-application, requesting that the report issued and circulated by Leonie Hening, dated 12 January 2024, be declared biased and outdated. He also proposed that paragraph 3 of Moorcroft AJ be varied and replaced.

[3]. The parties are married to each other, and both are holders of full parental rights and responsibilities regarding Y[...] S[...], a minor child born on September 1, 2020.

[4]. Both the Applicant's and Respondent's applications are brought in accordance with Rule 43(6) and pertain to the minor child's primary residence, care and contact.

[5]. On 17 August 2023, Moorcroft AJ appointed by agreement of the parties, Ms Leoni Hening, a registered social worker to investigate what is in the best interest of the minor child about residency, including whether a regime of shared residence should be implemented and what each of the parties should exercise, and to report to the parties in writing with recommendations.

[6]. Ms. Hening released her final report and recommendations on February 8, 2024. She recommended amongst other, that the minor child's primary residence be with the Applicant and the Respondent be afforded rights of contact set out in a rotation schedule consisting of a four-weekly cycle. She also recommended that a parenting coordinator be appointed to assist the parties in reducing the risk of conflict between them and to help them with important decisions regarding the minor child's best interests.

[7]. The Respondent opposed the Applicant's application and submitted that Ms. Hening's report is biased and outdated.

[8]. He proposed to exercise contact in a phased in manner and move into a shared residency regime that for three months – every alternative week, the Respondent

collects the child from school on Thursday who will reside with him, and he will drop the minor child off at school on the succeeding Monday.

[9]. The week that the minor child is with the Applicant, the Respondent will collect the minor child from school and return her at 19h00 that evening to Applicant, bathed, fed and ready for bed, and that the Respondent has daily telephone and/or video calls with the minor child between the times of 19h00 – 19h30 on days the minor child is not in his care.

[10]. After the phased in process has completed, the Parties will exercise a shared residency regime and the minor child will rotate on weekly basis in that the non-resident parent will collect the minor child on a Sunday 14h00 and return the minor child the succeeding Sunday at 14h00.

[11]. The non-resident parent will be allowed to collect the minor child on a Wednesday after school and return the minor child at 19h00 that evening to the resident parent, bathed, fed and ready for bed, and the non-resident parent will have daily telephone and/or video calls with the minor child between the times of 19h00 – 19h30.

[12]. The Applicant on the other hand proposes that the primary residency of the minor child be awarded to her and the Respondent shall exercise contact with the child , subject to the child's religious, educational, sporting, social and cultural activities as follows:-

12.1 Week one and week three: the Respondent shall take the child to school and collect her every Tuesday and Thursday, and he shall return her to the Applicant by 18h30 each evening.

12.2 Week two: The Respondent shall collect the child from school on Wednesday afternoon. He shall feed her supper, bathe her, and he shall return her to school the following morning.

12.3 On alternate week 4: the Respondent shall collect the child from school on Friday. The child will sleep over on Friday and Saturday nights. He shall return the child to the Applicant on Sunday at 16:00; however, this is subject to the parenting coordinator's approval.

[13]. The Applicant proposed that Martin Stous, an educational psychologist, be appointed as the Parenting Coordinator. The Respondent is opposed to Dr. Stous appointment and suggested that a Parenting Co-ordinator be appointed by joint consent within seven days of granting the order, failing the parties' agreement in appointing the Parenting Coordinator. FAMSA will appoint a Parenting Coordinator with a minimum of 15 years of experience, and this appointment will be binding on the parties.

[14]. Upon reviewing both applications, the disputes between the parties centre on Ms. Henig's report. The Respondent suggests that it is outdated and appears to be biased.

[15]. Respondent argued that the Henig report was dated 12 January 2024, and an amended report was issued on 8 February 2024. Both reports were known to the Applicant for at least seven months as at the launch of her application, and question the Applicant's decision to initiate it.

[16]. The Respondent further argued that Henig made specific factual findings in her report that are solely reliant on the Applicant's hearsay allegations, which were at the time untested and largely speculative.

[17]. Henig's mandate was to investigate what is in the best interests of the child on residency, including whether a regime of shared residence should be implemented and what contact each of the parties should exercise, and to report to the parties in writing with the recommendations.

[18]. An issue was raised on the fact that the Applicant's application was signed and commissioned on 7 August 2024, a day before the Interim Protection Order was set down for hearing on 8 August 2024. The application was served on the Respondent by the sheriff on 4 September 2024. The Respondent contended that the Applicant advanced the application as a chess piece, that she conscientiously intended to keep evidence from this court.

[19]. Henig reported that the child is a beautiful, delightful, gentle, nurtured three-year-old girl. She is very bright with a warm, engaging personality. She also stated that the child socialises well with children at school and out of school, making friends quickly. Further, she had achieved all her developmental milestones within the normal expected time range.

[20]. More importantly, Henig observed that both parents engaged with the child in an exceptionally warm and loving manner, and both are attuned to the child's needs. Both demonstrated they could get down to the child's level and engage her in an age-appropriate manner.

[21]. She further observed that both parents can provide for the child's material and intellectual needs. The negative is the parents' inability to co-parent effectively and constructively, which may, according to Henig, interfere with the child's psychological well-being and her future development.

[22]. Henig's conclusion in this regard is that the child should remain in the care of her parents and be allowed to establish meaningful relationships with both parents. She

further stated that the child should be allowed to develop a connection with her extended family and maintain a connection to their culture and their traditions.

[23]. Having stated all the positives above, Henig found that the Respondent did not always seem to prioritise the child's needs and best interests over his own. It was reported that the child has been exposed to the Respondent's violent and aggressive outbursts towards the Applicant. The Respondent denied having violent and aggressive outbursts towards the Applicant.

[24]. This Court is of the view that this issue formed the subject matter of the interim protection order that the Applicant obtained against the Respondent in the Randburg Magistrates' Court. That order was discharged, which could only mean that the Court seized with the matter found no merit to the Applicant's case.

[25]. Henig made recommendations that the child should reside primarily with the mother and that the Respondent should be afforded regular and frequent contact with the child. The Respondent questions this recommendation, and hence, the challenge of the report is that it is biased and outdated.

[26]. As upper guardian this Court, when determining the best care, residency and contact arrangements in the interest of minor children, the Court is not looking for the perfect parent, but rather the least detrimental alternative available for safeguarding the children's growth and development.¹

[27]. In *Schlebusch v Schlebusch* ²1988 (4) SA 548 (ECD) at 551I to 552B Millin J remarked as follows:

[28]. "...I view with concern any trend towards the granting of joint custody orders. While there may, in rare cases, be a continuing situation where joint decision-making is

¹ See *P v P* 2007 (5) SA 94 (A) at para 24.

² 1988(4) SA548 (ECD) at 551I – 552B

possible and where the children continue, even years after divorce, to regard their parents with equal affection and loyalty, such an Utopian state of affairs rarely exists in practice. While 'parents are forever' (to use professor Schafer's phrase) in a purely biological sense, I cannot agree that the awarding of joined custody will, or is even likely to, ensure 'a continuing relationship between the child and both its parents, so that it need not feel disserved, abandoned or rejected by the absent (sic) parent'.

[29]. In *Pinion v Pinion*³ it was remarked that although parties may firmly be convinced that they will be able to jointly discharge the function of custodian parents without any friction or deadlock, the Court remained concerned about the risk that in the future, irresolvable disagreements between them will have a detrimental effect of the minor child and may place the child in the opportunity of playing one parent off against the other.

[30]. The Courts have refused to grant shared residency regimes for various reasons, including the acrimony between the parents, the inability to communicate effectively as parents, the disruptive effect on children being constantly hurled backwards and forwards. Children continuously having to adapt to changing homes and living arrangements/environments. Children must accommodate the separation of their parents by adjusting to different parenting styles and often varying socio-economic circumstances as they move between their parents' homes.

[31]. King J in *McCall v McCall*⁴ said that where a court is tasked with determining the best interests of children, the court is not adjudicating a dispute between antagonists with conflicting interests to resolve their discord. The court's concern is for the child.

[32]. In the matter of *Kruger v Mourtzios* 2021 JDR 0916 (GP), the following was held:

³ 1994 (2) SA 725 (D) at 730G-J

⁴ 1994 (3) (SA 201 (CPD)

“On the papers filed of record, I perceive both parties to be rash and impulsive at times. However, both parties evinced that they care deeply for the children and want to be involved in their children's lives. Both have the necessary means and support structure to provide primary care and residency. They have very different parenting styles, which contributes to animosity and discord. Having regard to the high level of acrimony between the parties and their different parenting styles...

Shared residency can be a positive outcome where parents cooperate, and arrangements are centred around the children's needs. However, in high-conflict cases where parents experience difficulty coparenting, research indicates that shared residency can be associated with adverse outcomes for children.

On the facts before me, the current residency, care, and contact regime would, in light of the parties' inability to meet each other halfway and move beyond their differences, not, in the long run, have been in the children's best interest.”

[33]. Similarly, in this matter, the parties have a very acrimonious relationship. They have been in and out of the courts, and the Applicant had at some stage obtained an interim protection order, which was later discharged. That, on its own, appears to have fuelled the acrimony between the parties.

[34]. The report of Henig may be perceived as biased against the Respondent, but her recommendations cannot be said to be without merit. The Respondent fails to show why the recommendations of Ms. Henig (who advised against shared residency at this stage) are not in the child's best interest.

[35]. I agree with the Applicant's counsel that the parties are entrenched in conflict and unable to co-parent effectively, making a shared residency regime untenable at this stage.

[36]. Due to the acrimony between the parties and their ongoing disputes, Ms. Henig recommended against shared residency, noting it would not support the child's emotional or psychological needs.

[37]. Absent any other expert recommendation, this Court is obliged to consider her recommendations. It must be borne in mind that what is paramount is the best interests of the minor child.

[38]. The current conflict between the parties can be deemed the most harmful and damaging element in the child's life. Therefore, until the parties can develop and maintain a conducive co-parenting relationship, a shared residency regime will not be in the child's best interest.

[39]. I need to address specific prayers of the Respondent before I deal with the orders that this Court intends to make. The Respondent in prayer 6 of his amended notice of motion seeks an order that if any of the parties move outside a circumference of ten kilometres of the matrimonial property situated at Unit 44 Hilton Sands, 27 Muller Street, Buccleuch, Johannesburg, they can only do so by way of a Court Order and/or the consent of the appointed parenting co-ordinator.

[40]. This, I believe, would be unconstitutional and an unnecessary intrusion of another person's freedom of movement.

[41]. The parties, by agreement, agreed to incorporate paragraphs 4.1 to 4.9 of the Applicant's Notice of Motion, the appointment of a Parenting Co-ordinator and that the mandate contained in paragraphs 5.1 to 5.9 of the Applicant's notice of Motion be incorporated.

[42]. The following order is made:

1. Paragraph 3 of the order of the Honourable Moorcroft AJ dated 17 August 2023 is varied and replaced with the content of this order.
2. The Primary residence of Y[...] S[...], a girl, born on 1 September 2020, shall be with the Applicant (the mother).
3. The office of the Family Advocate in Johannesburg is directed to complete an enquiry and compile a report specifically regarding the minor child, Yaavdi Sewpwesadh, and investigate further the suitability of a shared residency aspect for her. The parties may approach the Court in accordance with Rule 43(6) to enforce any recommendations that may be contained in the final report of the Office of the Family Advocate.
4. The Respondent shall exercise contact with the child as follows:-
 - 4.1 Week One and Week Three: the Respondent shall take the child to and from school every Tuesday and Thursday, and shall return the child to the Applicant by 19h00 each evening;
 - 4.2 Week Two: The Respondent shall collect the child from school on Wednesday afternoon and return her to school the following morning
5. The parties shall exercise contact with the child relating to holidays, special days and religious days, as follows:
 - 5.1 All holidays shall be shared equally, with the first and second half of each holiday being alternated between the parents:
 - 5.1.1. From date of this Honorable Courts order until the child turns five years old, holiday contact shall be spent with each parent in blocks of three days and two nights.
 - 5.1.2. Once the child has turned five years of age, paragraph 4.1 above shall be exercised in blocks of four days and three nights.
 - 5.2. Public holidays shall be shared equally between the parents. The child will sleep over the night preceding the public holiday with the parent with whom she will be spending the day with.
 - 5.3. Diwali shall be shared equally between the parents.
 - 5.4. Christmas, New Year and Easter shall be alternated between the parties.

5.5. Mother's Day will be spent with the applicant and Father's Day with the respondent, irrespective of which parent the child is meant to be with on that Sunday. The child will sleep over the night preceding the Mother's Day and Father's day with the relevant parent.

5.6. The child's birthday shall be exercised in such a manner that she shall wake up with one parent and go to sleep with the other.

5.7. The child shall spend the day and sleepover with both parents on their respective birthdays. The parent whose birthday it is, shall collect the child from school on the day of their birthday, and they shall return her to school the day of their birthday, and they shall return her to school the following morning.

5.8. The parents shall have daily telephone and/or video calls with the child while she is in the other parent's care. The call shall take place between 18h00 and 18h30.

5.9. If one parent cannot take care of the child for a period of 12 hours, or longer, then the other parent must be afforded first right of refusal.

6. Dr. Martin Strous, an educational psychologist, is appointed as the Parenting Coordinator ("the PC"). The PC's mandate shall be as per the PC's required Parenting Coordinator contract and shall also include:

6.1. The power and authority to monitor and amend the child's contact with the respondent.

6.2. Assist the parties in reaching the scheduling of contact on an annual basis in January of each year.

6.3. The PC shall be entitled to appoint any professional that he deems appropriate to assist the PC in exercising his powers or whose services may be required in ascertaining or taking care of the child's needs, wellbeing and her best interests.

6.4. The PC shall be entitled to make contact and engage with any person who has contact with the child, teachers, friends or treats the child such as teachers, doctors, therapists, child minders, and shall be entitled to any reports or tests pertaining to the child.

6.5. The PC is entitled to issue directives to the parties as and when necessary pertaining to the best interests of the child, which shall also be applicable in instances where the parties cannot reach agreement on decisions to be made in relation to the child and which shall also include ancillary issues such as holiday dates and destinations, medication, and/or purchasing school necessities such as school bags, and all parties hereto shall comply with the directives until such time that they are varied or set aside. Any directive issued by the PC shall be subject to judicial overview by the High Court of South Africa, Gauteng Division, Johannesburg ("the Court"). Should either party not be satisfied with any directive issued by the PC, that party shall approach the Court, with notice to the other party, by application for an appropriate order.

6.6. Mediate the issued that may arise from time to time in respect of the child which shall include the issue of maintenance. Should the issue of review maintenance not be resolved through mediation, either party retains the right to approach the Maintenance Court for a variation of the child's maintenance needs.

6.7. Provide for a method of constructive communication between the parties.

6.8. Provide for a dispute resolution procedure in the event that the parties are not able to resolve any issue that arises in respect of their parental responsibilities and rights or any issue that may arise in respect of the child.

6.9. The parties shall be equally liable for the costs associated with the PC or any professional appointed by the PC.

6.10. The PC's appointment is only capable of termination by order of court, alternatively if the PC resigns. In the event that it is required for a replacement PC, Ms. Leonie Henig shall be approached to make such appointment.

MP Kumalo
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant: Adv R Andrews

Instructed by: Paresh Pursooth Attorneys

For the respondent:

Instructed by: Ghirao Incorporated