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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-087577

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

6 February 2026 _____
DATE SIGNATURE

In the matter between:

M[….], T K First Applicant

and

N[….], M A Respondent

This judgment and the order incorporated herein is handed down electronically by circulation to the parties' legal representatives by e-mail and uploading to CourtOnline.

JUDGMENT

Moultrie J:

[1] The parties to this application are the parents of a minor child. The applicant

(the father) seeks an order holding the respondent (the mother) in contempt of court in respect of two alleged breaches of their Parenting Plan Agreement that was made an order of court in November 2020 by the Daveyton Children's Court in terms of s 34(1)(b) of the Children's Act, 38 of 2005. The order further seeks the mother's committal to prison for 30 days suspended for one year on condition that she complies with the Plan.

[2] The Plan records that its purpose is to provide "*an outline*" to "*assist the parents*" in meeting the child's needs and interests and in exercising their responsibilities and rights. It is to be noted that it was concluded some five years ago, when the child was 4 years old. The parties agree that her needs and interests evolved between that time and the time around her 8th birthday in June 2024, when the events giving rise to both instances of alleged contempt took place.

[3] The father alleges that, in each instance, the mother "*deliberately defied*" the court order and "*denied*" or "*refused*" him access to the child by failing to comply with a clause in the Plan which deals with the exercise of his rights of contact with her. It stipulates in relevant part that:

> *Mr M[…] will have contact with the concerned child on alternative weekends, commencing on the 13/11/2020. He will fetch the minor child at the designated address from the hours of 18:00pm to 19:00pm and, return the concerned child on Sunday from 18:00pm-19:00pm.*
>
> *…*
>
> *Should there be any delays and/or any changes as aforesaid for either party; the relevant part, shall notify the other party accordingly.*

[4] There is a material dispute of fact in relation to the first alleged instance of

contempt. According to the mother, the parties agreed that the child would not be fetched by the father upon the commencement of 'his' weekend on the evening of Friday, 12 June 2024, but that she would instead stay with the mother until 20h00 on the Saturday so that she could have a pyjama party. Recognising that the mother could not have been in contempt of court if such an agreement had indeed been concluded, and that her version in this regard is not "far-fetched or clearly untenable",[1] counsel for the father conceded that the first alleged instance of contempt was unsustainable. In my view, this concession was correct: it is apparent from the last sentence of the quotation above that the Plan was amenable to amendment on an *ad hoc* basis (and as appears from allegations regarding the second alleged instance of contempt discussed below, it appears to be the father's own contention that this may be done by agreement). As such, it cannot be found that the father discharged his onus of establishing that the mother did not comply with the order in this instance.

[5] The events relevant to the second alleged instance of contempt took place the following week. Since it was the school holidays and the mother was at work, the child was (to the father's knowledge) staying with, and being cared for by, her maternal grandmother in C[...] Park, Benoni.

[6] On Wednesday, 19 June 2024, the father contacted the mother via WhatsApp and requested to have her for the weekend. Even though this was evidently not 'his weekend' (it will be recalled that the agreement stipulated that he would have her on alternate weekends), the mother agreed but requested that he

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[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

should "*please fetch her in benoni as she is there for the holidays*". The father's first response (the following day, 20 June 2024) was grudgingly agreeable: "*You know I have addressed with you my discomfort in fetching [the child] on destinations that we we've not agreed on. <u>If this is a favor fine</u> but it can't be the norm*" [emphasis supplied].

[7] Unfortunately, however, a texting 'spat' then developed, during which the father changed his mind, saying "*I don't have a problem with [the child] being at your mom for holidays however when collecting [her] <u>it must be as per our agreement</u> and have been raising this timeusly with you*" [emphasis supplied]. The mother responded by pointing out that it would cause her greater inconvenience for her to fetch the child from her mother's house and take her to her own house for the father to collect her, than it would be for him to directly fetch the child in Benoni. But it does appear that she agreed on 20 June 2024 that he could collect the child at her house in Dawn Park Boksburg. This appears from the following exchange:

> *[Father, 13:18]: So I see how this works , Nna I must be driving extra km for my child because the child is not at the respective address at the time of collection.*
> *[Mother, 13:19]: I said il speak to my mom about your child and il come back to you as im the one with a baby sitter problem and not us*
> *[Mother, 13:20] II catch a taxi with [the child] to Dawn Park and you will find her there as the owner of the car refuses"*

[8] That is where matters rested until the following day (Friday, 21 June 2024), when the WhatsApp exchange continued as follows:

> *[Mother, 17:16]: Hi please when u get to C[...] Park please tell the security u*

going to 7[…] the gate isn't working
[Father, 17:17]: Hi there, I never agreed to go to C[...] Park.
[Father, 17:23]: I will go to the address which stated on the Parental Plan and if [the child] is not there at agreed address, a dispute will be declared through the legal process.
[Mother, 17:25]: Ok sharp see u at the courts
[Mother, 17:35] I'm not going to climb a taxi with [the child]
[Father, 17:40]: I was not the one who sent [the child] to C[...] Par in the first place. Well it's up to you which mode of transport you want use.
[Mother, 17:42]: I left my child at my morns coz the schools are closed but it's fine
[Mother, 17:43]: Go use your Brain's goodnight
[Father, 17:47]: You are in contempt of the court order in terms of accessing my child at the agreed address as per the Parental plan and will be getting a report from the social worker as she has been briefed previously on the matter and then it will be a legal showdown.
[Father, 17:47]: I don't appreciate your insults

[9] It is apparent from these exchanges that both parties changed their minds over the period between 19 and 21 June 2024 and that they did not ultimately agree on where the child could be fetched on the Friday evening. Although the pleadings are unclear as to what precisely occurred on the evening of 21 June 2024 after the last of these messages (I return to this below), it does seem to be undisputed that the child was ultimately <u>not</u> available to be fetched at the Dawn Park address at 19h00 that evening.

[10] In the absence of an *ad hoc* agreement, it was submitted by the father's counsel that the "designated address" referred to in the clause quoted above is the mother's house in Dawn Park, Boksburg, because that is the address specified in the Plan as the child's "Primary Residence". I am unable to agree.

Applying the accepted principles of documentary interpretation which require me to consider the text, context and purpose of the clause,[2] it seems to me that the term "designated address" is properly to be understood as being an address "designated" by the mother, albeit within reasonable limitations. While a "primary residence" can be understood at the address at which the child should ordinarily be resident, it is evident from the Plan itself that does not require that the child resides there each and every evening (or at least each and every Friday evening on which the father is entitled to fetch the child). Indeed, the circumstances that were present in this very instance (i.e. where the child was staying temporarily at her maternal Grandmothers' house) are a clear example of circumstances under which it would be patently absurd to interpret the "designated address" to mean the address identified as the "primary residence".

[11] Despite her (somewhat late) change of mind between 17h15 and 17h45 on the evening of 21 June 2024, I do not think that it was unreasonable of the mother to have designated her mother's address in C[...] Park Benoni as the address at which the child could be fetched when one considers the relative inconvenience (or lack thereof) that would be caused to the parties by virtue of the late change. Whereas the mother would have had to undertake an additional taxi ride with the child after dark, the father would only have had to travel a few extra kilometres in his car. In the circumstances, I find that the father has again not established that the mother's conduct infringed an order of court.

[12] However, even if my interpretation of the phrase "designated address" in the

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[2] *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

Parenting Plan is incorrect and the mother was indeed obliged by the court order to have 'made the child available' at her house in Dawn Park, I do not accept that it may be inferred from the facts set out in the papers (and applying the *Plascon-Evans* rule)[3] that the mother's conduct constituted deliberate defiance of the court order in a manner that "denied" or "refused" the father access to the child, as the father alleges. In this regard, I note that it is not clear to me what actually occurred on the evening of 21 June 2024 after the last WhatsApp message quoted above. If the father did in fact fetch the child in Benoni, then there can be no question of his right to access the child having been denied – only his 'right' to fetch the child at a particular location. And if he in fact did not fetch her (and thus did not have access to her that evening or even later in the weekend), it would seem to me that this was not because the mother intentionally prevented such access. In either instance, such non-compliance as there was (i.e. not making the child available to be fetched in Dawn Park, but in C[...] Park) was both not wilful and *de minimis*.

[13] An attorney and client costs order is justified when "*by reason of special considerations arising either from the circumstances which gave rise to the action or from the conduct of the losing party, the court considers it just… to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation*".[4] Attorney and client costs have been awarded where conduct has found to be vexatious even in the absence of an

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[3] This rule applies irrespective of where the onus lies: *NDPP v Zuma* 2009 (2) SA 277 (SCA) para 27.

[4] *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging* 1946 AD 597 at 607; *Swartbooi & Others v Brink & Another* 2006 (1) SA 203 (CC) para 27.

intention to be vexatious and even where the litigant's conduct was *bona fide*[5] but where he "*put the other side to unnecessary trouble and expense which the other side ought not to bear*".[6] A failure by a party to act reasonably may constitute a ground for awarding costs on an attorney and client scale.[7]

[14] In this instance, while I carefully considered whether the father's conduct in pursuing the litigation was vexatious or unreasonable, I ultimately reached the conclusion that he appears to have litigated out of frustration in the context of an unseemly spat which had developed between the parties and in which neither of them could be said to have acted with complete *decorum* and in the best interests of the child. I thus conclude that a punitive costs order is not warranted and that the costs should simply follow the result with counsel's fees on scale "B".

[15] In the circumstances I make the following order:

1. The application is dismissed.

2. The applicant is ordered to pay the respondent's costs on the party and party scale, including the costs of counsel on scale "B".

RJ MOULTRIE
JUDGE OF THE HIGH COURT
JOHANNESBURG

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5 *Ernst & Young v Beinash* 1999 (1) SA 1114 (W) at 1148B-C.

6 *Re Alluvial Creek Ltd* 1929 CPD 532 at 535.

7 *Djama v Government of the Republic of Namibia & Others* 1993 (1) SA 387 (NM) at 396B-C.

Date Heard:	5 February 2025
For the Applicant:	AM Kutama of AM Kutama Attorneys: 081 544 06191, amkutama92@gmail.com
For the Respondent:	M Vilakazi of Menzi Vilakazi Inc Attorneys: 073 976 4099, menzi.vilakazi@mvlegal.co.za.