

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
(Gauteng Local Division, Johannesburg)

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

Case no: 4809/2022

Heard on: 29 NOVEMBER 2023

Judgment handed down: _____

In the matter between

G[...] P[...] D[...]

APPLICANT

Versus

M[...] M[...]

RESPONDENT

JUDGMENT

STRIJDOM, J

A INTRODUCTION

1. The applicant seeks an order declaring him the sole holder of parental responsibilities and rights in respect of guardianship and care of the minor child, placing the minor child's primary residence with applicant, terminating respondent's rights of contact and applicant shall be entitled to appoint a guardian to the minor child in the event of his death.

2. The respondent opposed the relief sought and filed a counter application seeking the minor child to be forensically assessed by Sarie Nel and that applicant must provide the necessary consent for such assessment. In the event that applicant fails to provide his written consent that the sheriff will sign all documents on applicant's behalf.

3. To avoid confusion, I will refer to the parties as the "mother" and "father" respectively as opposed to the applicant and respondent as per convention.

4. The parties married each on 6 January 2016 and were divorced on 24 October 2019. The minor child was born of this marriage during 2016. The parties entered into a settlement agreement dealing with the parental responsibilities and rights which settlement agreement was made a order during the divorce proceedings.¹

¹ Caseline: section 0001-32 to 0001-39

5. The parties were awarded jointly parental responsibilities and rights in respect of the minor child, but his primary residence and care were awarded to the father. The mother who was awarded contact rights which include one weekend a month holiday contact, and Skype contact.
6. The settlement agreement was concluded after the family advocate investigated the best interests of the minor child in respect of care, contact and his residence.²

B CONTENTIONS OF THE PARTIES

7. Given that primary residence was already granted in favour of the father in the said court order, it is unclear as to why this is included in the relief sought by the father in this application.
8. I state only material facts as far as the relief sought by each party in their respective applications is concerned.

(I) FATHER'S CASE - MAIN APPLICATION

9. The father alleges that the mother during January 2018 relocated with the minor child to Cape Town without informing the father of her and the minor child's

² Caseline: Section 008-2 to 008-13

whereabout which caused the father to appoint a tracer who traced her to Gansbaai Western Cape in March 2018.

10. The father travelled to Gansbaai to exercise contact with the minor child and during these contact sessions, the minor child exhibited age-inappropriate sexual conduct.
11. The concerns about the minor child were investigated by the Family Advocate who made recommendations in this regard. The mother's spousal visa expired on 26 September 2019 and she returned to Namibia.
12. The father contends that the mother returned the child after the 2019/2020 December holiday contact period on 2 January 2020. The mother started Skype contact for a few months and then stopped.
13. The mother forwarded 9 July 2020, a Whatsup text to applicant for the minor child, indicating that she won't call the child anymore as she cannot stand the abuse (by the father apparently) any longer. The mother in 2020 sent texts to congratulate the minor child on his birthday and also on Christmas day.
14. The father alleges further that the mother and her family blocked him on their cell phones and he could not contact respondent or her family.

15. The mother visited South-Africa during June to August 2022 but did not make any contact with the child or the father. The minor child was 2 and a half years old when he last saw his mother.

16. According to the father, he experiences various problems due to the absence of the mother. He has family in Namibia and cannot visit as he requires the mother's consent to travel outside South Africa and he requires her consent to take the minor child.

17. The father is of the view that it would not be in the minor child's best interest to initiate contact with the mother as he does not know her. He is of the view that it would be best to terminate responsibilities and rights of the mother.

(II) MOTHER'S CASE – COUNTER APPLICATION

18. The mother states that due to her divorcing from the father of the child, she no longer had a valid visa to remain in South Africa and could no longer renew her spousal visa. As a result of her visa status at the time, her employment terminated and she had no other option but to return to Namibia,

19. It is common cause that the last physical contact the mother has had with the minor child occurred during 23 December 2019 until 2 January 2020, when the child was in the mother's care in Namibia.
20. The mother states that were it not for the intervention of her attorneys and consideration of seeking redress through the urgent court, her contact with the child in Namibia would not have occurred. The mother states that she did indeed communicate with the child on his birthday,
21. The mother further states that when she was exceptionally vulnerable, she sent a message to the child on 9 July 2020 and told him she would not be calling anymore. She states that she has attempted to contact the child, however, the father has not allowed her to exercise such contact,
22. The mother further states that she did make social media posts and created donation pages, same was done in order to assist her financially to pay for legal fees in litigation against the father.
23. The mother contends that her non-existent contact and relationship with the child is not due to any act or omission on her part but rather due to an intentional refusal by the father to allow her to have telephonic and/or video call contact with the child.

24. The mother in the counter application refers to the Family Advocates recommendations (as well as the settlement agreement where it was specifically agreed that the parties agreed to appoint Sarie Nel, a registered social worker, to investigate and assess the alleged sexual, inappropriate conduct of the minor child, the costs of the assessment to be paid equally by the parties.
25. The mother states that despite requests from her attorney for the father to provide his written consent of the child to be referred for a forensic assessment with Nel, the Respondent has failed and refused to do so. This is why the mother seeks the relief as per her counterclaim.

C THE LAW, PROCEDURE AND ANALYSIS

i) The best interest of the child

26. Section 28(2) of the Constitution of the Republic of South Africa, 1996 (hereafter 1996 Constitution) provides that '[a] child's best interests are of paramount importance in every matter concerning the child'. In terms of section 7(1) of the Children's Act³ when determining what is in the best interest of the child, the court is duty-bound to consider among others, the nature of the personal relationship between the child and the parents or any specific parent;⁴ the

³ 38 of 2005

⁴ Section 7(1)(a)(i) of the Children's Act

attitude of the parents towards the child;⁵ the capacity of the parents to provide for the needs of the child, including emotional and intellectual needs;⁶ and the child's age, maturity and stage of development.⁷

27. The right to contact, or to be spared contact, vests primarily in a child. The statutory definition of parental responsibilities and rights includes 'the responsibility and the right ... to maintain contact with the child.'⁸

28. In considering the parameters within which contact should be permitted, a court must balance the competing interest of the custodian parent, whose discretion to control the child's upbringing should not be unduly displaced, with those of the non-custodian parent, whose contact should not, without good reason, be so confined as to inhibit his or her relationship with the child.⁹

29. The nature of the relationship between the child and his mother does not appear to be good as a result of the last physical contact with the child on 2 January 2020. This is an important matter that should be investigated to determine what may have strained the child's relationship with the mother, and what can be done to improve their relationship.

⁵ Section 7(1)(b) of the Children's Act

⁶ Section 7(1)(c) of the Children's Act

⁷ Section 7(1)(g)(i) of the Children's Act

⁸ Children's Act 38 of 2005 s 18 (2)(b)

⁹ Marais 1960 (1) SA 844 (c) cited with approval in Mohaud 1964 (4) SA 348 (T)

30. The parties also appear not to be on good terms. There appears to be a serious lack of communication between the parties which is not in the best interest of the child.

II) Holistic assessment of evidence

31. It is generally accepted, as was stated in **Terblanche v Terblanche**¹⁰, that a court ‘... has extremely wide powers in establishing what is in the best interest of minor or dependent children. It is not bound by procedural structures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, or whatever nature, which may be able to assist it in resolving custody and related disputes’.

32. In **F.J V E.J**¹¹ it was held that: ‘this Court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interest of the child.’

III) Investigations

¹⁰ 1992 (1) SA 501 (W) at 504

¹¹ 2008 (6) SA 30 (C)

33. In terms of section 29(5)(a) of the Children's Act, the court: "May for the purpose of the hearing order that a report and recommendations of a family advocate, a social worker or other suitably qualified person must be submitted to the court."
34. It is evident that the mother wants to be part of the child's life and wants to have contact to the child in terms of the said order. The father relies on the mother's non-engagement with the child as a reason for guardianship and unsupervised contact to be revoked. In my view this in itself requires an investigation.
35. As far as the main application is concerned, I conclude that without a proper investigation into the best interest of the child by the family advocate and a social worker, a proper case has not been made out for the relief sought by the father.
36. In the counter application it was argued by the mother that there is a need to involve the services of a social worker to conduct a forensic investigation into the best interest of the child.
37. In my view, an assessment by a social worker and the family advocate will guide a court in respect of where the child is at emotionally, developmentally, and in respect of his relationship with the respective parties. Such assessment can further guide the parties in terms of how best to support the child in his

relationship with each of the parties and, should there be a break in the relationship between the child and the mother, recommendations can be made in terms of how best to overcome the divide.

ORDER:

38. In the result, I make the following order:

39.

1. Condonation is granted for the late filing of the parties answering and replying affidavit.
2. The father's application is dismissed.
3. The mother's counter application is granted.
4. The father is ordered to provide the mother with written consent within 10 (ten) days, from the granting of this order, for the minor child, L[...] C[...] D[...] (Identity number: [...]), to be referred for a forensic assessment with Mrs Sarie Nel, alternatively any other suitably qualified professional in her stead, including any other form of treatment or assessment as prescribed by Mrs Sarie Nel or any other suitably qualified professional;

5. Should the father fail and/or refuse to provide the mother with consent as set out in prayer 3, the Sheriff of the High Court is authorised to sign the necessary consent documents on behalf of the father.
6. Mrs Sarie Nel or any other suitably qualified professional must conduct a forensic investigation into the best interest of the minor child regarding the contact with the mother.
7. The Office of the Family Advocate is ordered to carry out an investigation forthwith, and to complete a report setting out its findings with respect to whether the mother's parental responsibilities and contact rights must be terminated or not.
8. Mrs Sarie Nel or any other suitably qualified professional is also ordered to compile a report that she will present to the court.
9. Mrs Sarie Nel or any other suitably qualified professional is also ordered to communicate her findings with the Family Advocate
10. The parties shall equally share the fees payable to Mrs Nel or any other suitably qualified professional.

11. Each part to pay their own costs.

JJ STRIJDOM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

For the applicant: Adv I Strydom

Instructed by: Riaan Louw Attorneys

For the respondent: Adv L De Wet

Instructed by: Schuler Heershop Pienaar Attorneys