REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 47512/18
REPORTABLE:NO
OF INTEREST TO OTHER JUDGES:NO
REVISED:NO
Date:23 April 2021

In the matter between:

P A K[…] APPLICANT

and

C M A S M[…] RESPONDENT

JUDGMENT

Van der Schyff, J.

Introduction

[1] When parents separate or divorce, the realities brought about by the separation require difficult decisions to be made. One of the most, if not the most difficult decision to make is the determination of the post-divorce residency, care, and contact regime that would be in the children's best interests.[1] As the upper guardian of all dependant and minor children, the court has the duty and authority to establish the appropriate post-divorce residency, care, and contact regime. However, no residency, care, and contact regime is set in stone. When

[1] Section 9 of the Children's Act, No. 38 of 2005.

circumstances change, a prior decision can be revisited. Issues of residency, care, and contact need then to be considered anew, taking into account the best interests of the children in the factual setting wherein they and their parents find themselves.

[2] The application concerns the best interests of three minor children. They are L[…], a girl, born on […] ([…]), L[…], a girl born on […] ([…]), and J, a boy, born on […] ([…]). For purposes of clarity, Mr. K[…] is referred to as the applicant and Mrs. M[…] as the respondent.

The law

[3] It was stated by King J in *McCall v McCall*[2] 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. Section 7 of the Children's Act informs the 'best interests of the child' standard by providing the minimum factors to consider when the child's best interests are determined. Guidance is also provided by principles extracted from applicable case law. In deciding this case, I regarded the guiding principles stated in case law and the factors stated in s 7, even though the case law and factors are not explicitly referenced.

Background

[4] *In casu*, the parties divorced in October 2018. They concluded a settlement agreement which provided amongst others (i) that both parties shall retain full parental rights and responsibilities with regard to the guardianship of the minor children, and (ii) that the primary care and residence of the minor children shall vest in the respondent, subject to the applicant's right of contact. The settlement agreement extensively sets out the applicant's general right of contact with the minor children and, in addition, cater for scenarios where the applicant is not

[2] 1994 (3) SA 201 (CPD).

resident in the same province as the children, where he would be resident in the same province as the children, or where he would be residing in the same province as the children for a period of 1 week or more. The settlement agreement also provides for the applicant to inform the respondent at least 24hours in advance in the event that he would not be exercising his contact rights, and for the parties to discuss the exchange of weekend visitations and/or holidays 'and as per the applicant's availability and/or work circumstances is as far as reasonably possible.' The parties also agreed that they would consider the other party's views in their respective capacities as joint holders of parental rights and responsibilities in all matters pertaining to the best interest of the minor children and all issues that might negatively impact the wellbeing of their minor children.

[5] It must be stated from the onset that the papers reflect that both the applicant and the respondent got so entangled in their own petty disputes and power struggles that neither truly showed any earnest consideration for the effect that their respective actions and the unavoidable consequences of the divorce, have on their minor children. They fell into the trap of perceiving their children's best interests through the lens of their own needs and experiences. This is displayed, *inter alia*, by the parties respectively deciding either to 'take' the children to relocate without affording them at least the opportunity to greet the other parent, or to 'keep' the children and not allow them to return to the other party after a visit- both occasions resulting in urgent court applications. It is likewise evinced in the disputes regarding the maintenance, the Kryptek shares, threats to cancel the lease agreement of the home wherein the respondent was residing in Pretoria, threats not to let the children visit their paternal grandparents or not allowing the applicant's wife or sister to collect the children from school, unnecessary quibbles regarding holiday contact, the comparing of the number of days each party had the children in his or her respective care, the language and tone of several WhatsApp-messages exchanged between the parties, and the tone of several letters exchanged between the parties' legal representatives. If

any of the parties' legal representatives played any role in supporting the narrow interpretation of the settlement agreement to lead to the illogical conclusion that three minor children may not have contact with their extended families and grandparents, or assisted in stoking the disputes regarding weekend and holiday contact and failing to direct their respective client's to the terms of the settlement agreement, such is to be frowned upon. What is evident from the whole body of information contained in the affidavits filed in all the applications is that the blame for the instability of and disruption to the children's lives cannot be laid at the feet of the respondent only.

[6] The factual context within which this court is to pronounce on the residency, care, and contact regime that would be in and advance the children's best interest, is that the respondent and the children were residing in Pretoria since about May 2018. The applicant and his wife moved to Pretoria in October 2018. Prior to her relocation to Pretoria, the respondent left the marital home and moved to her sister in Thabazimbi. The respondent submitted that she had no choice but to agree to an arrangement to reside in Pretoria because the applicant made it clear that he would only provide accommodation in Pretoria. It is the respondent's case throughout that she was entirely at the mercy of the applicant who, with his father's financial support, had the upper hand to dictate to her. She stated that she reluctantly agreed to relocate with the children to Pretoria when the parties separated because she had no other alternative. Although some of the WhatsApp messages annexed to the respective affidavits do indicate that the applicant sometimes expressed a view that things must happen as he prescribes because he is paying, it would be unfair to the applicant to find on the papers that the respondent agreed to relocate to Pretoria solely because she had no other option. WhatsApp messages between the respondent and her father-in-law indicate that an opportunity was created for her to be actively involved in the Kryptek-business and that she agreed to move to Pretoria after the separation to participate in the business to earn an income. However, her participation in Kryptek did not realise, and she sold her shares to the applicant. This gave rise

to additional litigation between the parties, with allegations of theft and breach of contract being flung around.

[7] The respondent avers that the failure to earn any income through Kryptek and the applicant's alleged failure to honour the terms of the shares' sale agreement necessitated her to reconsider her position as far as her staying in Pretoria is concerned. Besides, she was not happy in Pretoria; she failed in securing employment, and her support structure was in Maasstroom on the family farm with her parents. She realised that she would be able to earn an income on the farm while providing a safe and secure environment for the children to grow up in. She decided to relocate to Maasstroom without informing the applicant, who by that time also resided in Pretoria with his partner, soon to become his wife, and exercised extensive contact rights with the children. This resulted in the applicant issuing an urgent court application wherein he sought the respondent's immediate return with the children to Pretoria to restore the *status quo*, pending the finalisation of an application that the children's primary care and residency be awarded to him. The respondent issued a counter relocation application. Since her first departure with the children in July 2019, the respondent married Mr. M[…] in October 2020. Due to the Covid-19 pandemic, he closed down his business in Pretoria and moved to Maasstroom. He leases a portion of the family farm in Maasstroom through a company and engages in farming.

[8] The above account does not encapsulate the full extent of the litigation that the parties became embroiled in pertaining to their contact with the minor children. I considered the founding affidavits, answering affidavits, replying affidavits, supplementary affidavits, and supplementary replying affidavits filed in all these applications. Although extensive papers were filed, the content is, for the most, repetitive.

[9] It must be stated at the outset that I cannot fault the respondent for wanting to relocate to Maasstroom. She was brought up in Maasstroom, and her support

structure is in Maasstroom. She will be able to earn an income there and, based on her own experience, is convinced that her children will be adequately educated at the local school. The hostility that existed between the parties and their respective families contributed to her decision to relocate. It is trite that divorce shreds the fabric of family life.[3] In this case, the parties' unique living arrangements, albeit agreed to, to be least disruptive for the children or provide them with the opportunity to enjoy extensive contact with the applicant, extended the discord and acrimony that existed pre-divorce, to the post-divorce scenario. Although the manner in which the respondent executed her decision to relocate is open to severe criticism and cannot be condoned, the respondent's decision in itself cannot be criticised.

[10] Since July 2019, after the court ordered her to return to Pretoria, the respondent frequently commuted between Maasstroom and Pretoria. She has not changed her mind regarding the relocation. With her farming activities expanding and her new husband moving to Maasstroom, it is evident that she made up her mind – and she still wants to take her children with her. The perception gleaned from the papers is that the respondent never doubted for a moment or even conceived the idea that she would not be able to take the children with her.

[11] The applicant accuses the respondent of not honouring the terms of the settlement agreement because she unilaterally decided to relocate with the children without discussing such relocation with him. This, he submits, is indicative of the respondent's selfish, impulsive and irrational behavior. In the result, he indicated in the July 2019 urgent court application that he seeks an order awarding the children's primary care and residence to him.

[12] 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

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[3] *Ford v Ford* [2006] 1 All SA 571 (SCA).

support structure to provide primary care and residency. They have very different parenting styles and this in itself contributed to animosity and discord. Having regard to the high level of acrimony between the parties and their different parenting styles, I am of the view that even if the respondent did not feel the need to relocate, the current residency, care, and contact regime would have had to be revisited. Shared residency can be a positive outcome where parents can co-operate and where arrangements are centered around the children's needs. However, in high conflict cases where parents experience difficulty co-parenting, research indicates that shared residency can be associated with adverse outcomes for children.[4] 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.

[13] On the papers filed of late, it has also been indicated that it is not only the respondent's position that will be changing in the near future. She might be the party who declared that she is relocating to Maasstroom, but there is an indication that the applicant's position is likely to change. However, uncertainty veils the extent of the proposed change. In motivating a substantive application for postponement that was argued on 26 March 2021, the respondent stated in her founding affidavit that the applicant's home in Pretoria was put up for sale. She hinted that the applicant might be planning to relocate to the United States of America. The applicant denied that he has any intention to move to America. He admitted that the house in which he resides is in the market. He is quiet, however, on where he proposes to move to once the house is sold. The respondent raised this aspect again in the supplementary affidavit filed after the court refused the postponement application. She indicated that the applicant is quiet regarding his plans in the face of a direct issue being raised on the point. Again, the applicant did not address the question as to where he intends to move to, in his replying affidavit to the respondent's supplementary affidavit. During

[4] L Trincer *Shared residence: A Review of Recent Research Evidence* 2011 Family Law (Chichester) 40.

argument when this aspect was canvassed with counsel, counsel for the applicant argued that it is evident throughout that the applicant has no intention to move from Pretoria, despite this direct claim not being addressed comprehensively in the answering papers to the postponement application. However, the reality remains that the house where the applicant is residing is up for sale, and no indication is given on the papers where the applicant plans to move to.

[14] The only question to be answered in light of the respondent's decision to relocate is whether the children's primary care and residency are to be awarded to the applicant or the respondent. In addition to the parties' submissions, the court has the benefit of reports filed by the Office of the Family Advocate and a report filed by a psychologist appointed by the Family Advocate, Ms. Elise Fourie. The respondent also filed an additional report by Dr. N Van Zyl. Before the factors considered in coming to a finding on the central question are discussed, it is necessary to contextualise the role of expert witnesses in proceedings of this nature.

The role of the expert witnesses

[15] The parties proceeded with the current applications on motion. Neither of the parties formally approached the court with an application to refer any aspect to oral evidence. The Office of the Family Advocate appointed Ms. Fourie as an independent expert. The Family Advocate was authorised by the court to appoint a clinical psychologist to investigate and render a report on the children's best interests. Ms. Fourie is not a clinical psychologist, and the applicant initially took umbrage with this fact. The respondent did not object at that stage. Although the applicant initially refused to co-operate with Ms. Fourie, he later agreed, and both parties attended to the necessary interviews and appointments.

[16] The respondent did not raise any objection to the process followed by Ms. Fourie or the Family Advocate, or the Family Counsellor. However, when Ms. Fourie's report became available, the respondent objected to the report being accepted and submitted that her appointment was irregular. This view is contrary to the views previously expressed by her legal representative. The respondent likewise objected to the final report filed by the Family Advocate. The respondent requested the court to postpone the application and order that Dr. N Van Zyl conducts a further assessment. She also wanted the costs of the assessment to be shared by both parties. The applicant objected. He indicated that he was responsible for Ms. Fourie's costs which already exceeded R84 000.00. It was also argued on his behalf that a further assessment would unduly delay the finalisation of this matter. A further practical hurdle that arose was that the applicant canceled the lease contract for the house, which was the respondent's residence in Pretoria, due to the dispute that arose between the parties regarding their respective obligations to contribute to the lease. The settlement agreement stipulated that the applicant would contribute R25 000.00 per month until the respondent remarries, whereafter he would only be liable for 50% of the amount. After the respondent's re-marriage, she contended that since her husband resides in Maasstroom, she does not need to contribute to the lease. Be that as it may, if the matter was to be postponed, the respondent would have had to stay with the children at her in-laws for the period until the finalisation of this application. In light of the extent to which this would further disrupt the children, and in light of the body of evidence already to my disposal, I deemed it to be in the children's best interest not to postpone the application for a substantial period. The respondent, who failed to file a supplementary affidavit after Ms. Fourie and the Family Advocate's final reports became available because she anticipated that the matter would be postponed, was allowed to file a supplementary affidavit. In adherence to the *audi et alteram* principle, the applicant could reply to any new aspects in the respondent's supplementary affidavit.

[17] However, this does not mean that I unreservedly embrace either Ms. Fourie's or the Family Advocate's recommendations or opinions in deciding this matter. It is trite that expert witnesses should state the facts or assumptions upon which their opinion is based in their reports.[5] As I will indicate below, and as pointed out by the respondent's counsel, some of the recommendations made by Ms. Fourie and the Family Advocate (and her team) cannot be linked to the factual findings and observations they noted. During argument, I canvassed this aspect with the applicant's counsel. She submitted that I must also have regard to the additional response of Ms. Fourie filed as an annexure to the applicant's 'replying affidavit to the respondent's supplementary affidavit,' and that I must take cognisance of Ms. Fourie's expertise and the fact that she cannot be expected to file a report that contains every factual finding. I agree, but the crux of an expert witness's opinion must be substantiated by observations and factual findings recorded in the report. The observations and findings recorded by the expert witnesses, however, remain valuable if adequately contextualised.

Ms. Fourie's report

[18] Ms. Fourie reported that both parents are sufficiently well-functioning adults with no indications of psychopathy, emotional instability, or personality dysfunction. Neither presented with 'character traits that may severely impact' on their ability to parent their children. Despite this conclusion, she indicated that it appears that Mrs. M[…] 'tends to be somewhat self-centered and does not fully consider the need or the best of the children.' She did not state that the respondent does not consider the children's best interests, but in her view, does not 'fully' consider their interests. Ms. Fourie also concluded that Mrs. M[…] 'may present with over-dramatized behavior, which does not exclude anger outbursts.' In an e-mail attached to the applicant's replying affidavit to the respondent's supplementary affidavit, Ms. Fourie clarified that she did not indicate that the respondent indeed has anger outbursts but that it is merely stated as a possibility. It is evident from

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[5] *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung Mbh* 1976 (3) SA 352 (A) 317F-G; *Nicholson v Road Accident Fund* (07/11453) [2012] ZAGPJHC 137 (30 March 2012).

Ms. Fourie's report that both parties are fallible human beings, like all parents. Ms. Fourie recommended that the applicant be awarded the primary residence of the children. She deemed him to be the parent with whom the children are emotionally bonded. She also holds the view that it would be least disruptive for the children to stay in Pretoria. Her recommendation followed because shared residence was not a viable option.

[19] It is evident from the results obtained by Ms. Fourie regarding L[…] that the child would prefer to spend equal time with both parents. L[…] prefers to remain in Pretoria because she would be able to see her father every day, and she could be with her friends in Tygerpoort School. L[…] verbalised that she 'does not worry about where she lives.' In her experience, the applicant spends more physical time with them and is the parent who mostly comforts her when she is scared. She views both Mr. M[…] and Mrs. K[…] in a positive light. I pause to indicate a discrepancy in Ms. Fourie's report at this juncture. Ms. Fourie reported that L[…] 'appears to view Mrs. K[…] and Mr. M[…] in a positive light, despite viewing Mr. M[…] as very strict', and yet concluded that 'She[L[…]] presents with positive feelings towards Mrs. K[…], but appears to feel threatened by Mr. M[…].' Ms. Fourie later states – 'in fact, [Li] fears Mr. M[…],' despite having previously recorded that Li felt loved by both her step-parents. The report does not provide a factual basis for the strong view that L[….] fears Mr. M[…]. A view that is confirmed in the e-mail annexed to the applicant's replying affidavit to respondent's supplementary affidavit where Ms. Fourie states – 'The children described activities that they enjoy with Mr. M[…], but it doesn't change the fact that, on a subconscious, covert level, they are scared/cautios (sic.) of him. This was confirmed by Mr. M[…] – he described himself as stricter that (sic.) Mrs. M[…] and related that the children obey him.' I can find no correlation between Mr. M[…]'s acknowledgment that he is strict and a conclusion that the children, therefore, 'fear' him.

[20] Ms. Fourie reported that L[…] also presented with severe anxiety. She is reported not to have a very strong bond with either parent. L[…] likes both parents but appears to be cautious in her relationship with Mr. M[…]. She perceives her mother as either emotionally absent or moving away from her. It appears that she feels emotionally closer to her father and his wife.

[21] Ms. Fourie reported that J[…] is very young. When playing, he interacted more with the figures he identified as the father and grandfather. When prompted to include the mother figure, he complied but set her aside quickly.

[22] Ms. Fourie found that the interactional analysis indicated that the applicant is an involved parent. It appears that he connects with the children equally well. The respondent, however, was unable to involve all three children in one activity effectively and did not seem comfortable playing with them in one room. The respondent appeared to be emotionally distant during the interactional analysis. Ms. Fourie recommended that it would be in the children's best interest if they remain in Pretoria and their father's care.

[23] The respondent took offense with Ms. Fourie's report, and she dealt extensively with the report in her supplementary affidavit. Applicant's counsel provided Ms. Fourie with the said response, and Ms. Fourie's reply was attached to the applicant's replying affidavit to the respondent's supplementary affidavit. During the argument, the *sui generis* nature of proceedings of this kind was stressed by applicant's counsel, and I was requested to consider the said response. Respondent's counsel did not raise any objection.

[24] Ms. Fourie's report indicates that the parties' contact arrangements have led to the strengthening of the emotional bond between the minor children and their father. They have benefitted emotionally from the additional time spent with their father. It is evident that Ms. Fourie placed heavy emphasis on her observation that Mrs. M[…] attempted to influence L[…] and her opinion that the respondent

did not consider the children's interests when she made the rash decision to relocate to Maasstroom without prior consultation with the applicant. She opined that if the respondent 'truly considered the best interests of the children there were many other avenues that she could have pursued other than making unilateral decisions based solely on her financial position.' Ms. Fourie did not elaborate on any of the available options that she opined were open to the respondent.

[25] I am of the view that Ms. Fourie's report did not adequately consider that the respondent needed to balance developing a financial enterprise in Maasstroom to enable her to earn an income to sustain herself independently from the applicant while also having to run a household in Pretoria since 2019. Although the initial relocation was rash and cannot be condoned, it is evident that the applicant would not have agreed to a relocation even if he was adequately consulted. Mediation failed, and the parties could not come to a joint decision on the proposed relocation. The respondent's subsequent conduct illustrates that the decision to relocate was not impulsive and that she is determined to see it through. I disagree with the view submitted by the applicant that the respondent's marriage and her husband's subsequent decision to relocate to Maasstroom and to engage in farming activities were orchestrated with the aim of succeeding in the counter-application. The applicant's own business was affected by the Covid-19 pandemic, and no person can be blamed for seeking other income-generating opportunities. I also disagree with the contention that the respondent acted impulsively when she married Mr. M[…]. As for her initial relocation to Thabazimbi, she cannot be faulted for desperately wanting to leave when her husband indicated that the marriage was over and that he was involved with someone else. The facts do not indicate that the respondent is 'nomadic' as submitted.

[26] I am of the view that Ms. Fourie's opinion that the respondent's need to relocate to Maastroom is selfish and self-centered coloured her perception of the

respondent. I am not ignorant to her observations and findings regarding the interactional analyses or her view that the respondent attempted to influence the children. I have to take cognisance of the fact that Ms. Fourie conducted the interactional analysis in only one session and that the respondent contextualises in her supporting affidavit how she experienced the session and the events leading up to the session. Although somewhat unorthodox, I also take cognisance of Ms. Fourie's reply that made its way into the bundle of documents as an annexure to the applicant's replying affidavit to the respondent's supplementary affidavit. Ms. Fourie deals extensively with some issues raised by the respondent in her supplementary affidavit, but she does not deny or contextualise the respondent's account of the first interview or the events preceding the interactional analysis.

[27] It is noteworthy that the parties' daughters were well aware of their mother's intention to relocate to Maasstroom and their father's preference to a shared residency regime since at least the first interview conducted with them by the Family Counsellor. Ms. Fourie's report does not indicate that any child expressed that they wanted to live with their father. They expressed the need to 'see him' every day.

Reports received from the Office of the Family Advocate

[28] The parties' residency, care, and contact regime, as set out in the settlement agreement, was not endorsed by the Office of the Family Advocate. No record of the divorce proceedings was made available. It will remain a mystery as to what evidence and arguments were proffered to move the presiding judge to grant the divorce order with the incorporation of the settlement agreement notwithstanding. It is evident that the parties' unique circumstances dictated the terms of the settlement agreement, despite the applicant negating such a view. Despite it being denied by the applicant, I am of the view that it is evident that the settlement agreement was drafted to cater for the fact that the applicant's work schedule prevented structured, regular contact with the minor children and was

crafted to provide additional contact when his work schedule allowed for it. However, when the applicant's working schedule changed, his enforcement of this contact regime resulted in the parties almost sharing residency, without the benefits or disadvantages of such a regime being adequately investigated, and without proper consideration as to whether this contact regime would, in the long run, be in the best interests of the children.

[29] The Family Advocate filed several reports during the course of these proceedings. The Family Advocate's report is based on the conclusions and recommendations made by the Family Counsellor and Ms. Fourie. I will thus focus my remarks on the Family Counsellor's report. He indicated that he first consulted with L[…] and L[…] on 28 November 2019. Both girls were aware of their mother's intention to relocate to Maasstroom. Of significance is the fact that although both children indicated that they would be very sad if they could not have contact with their father every day if they relocated to Maasstroom, the report does not reflect that the children even considered the option that they would remain in Pretoria while their mother relocated to Maasstroom. At that stage Le regarded her father's home as her primary residence and her father as her primary caregiver. L[…] regarded her mother's home as her primary residence and her mother as her primary caregiver.

[30] In a follow-up consultation held on 13 November 2020, almost a year later, L[…] still regarded her mother's home as her primary residence and her mother as her primary caregiver but emphasised that she wants to see her father daily. The Family Counsellor noted that L[…] and L[…] reflected a positive attitude and relationship with both their step-parents. L[…] now also indicated her mother's home as her primary residence and her mother as her primary caregiver. Although the parties' son, to whom the Family Counsellor erroneously referred to as Phillip, was too young to be formally assessed, the Family Counsellor concluded that he regarded his father as his primary caregiver.

[31] The Family Counsellor did not conduct any additional interviews with the children since 13 November 2013. However, despite the recorded findings referred to above, and after considering Ms. Fourie's report which is dated 7 February 2021, he states that he agrees with Ms. Fourie's findings that the children identify with their father as their primary 'emotional bonding figure.' In light of the fact that the Family Counsellor does not provide any explanation, and no factual substantiation for this view, a view that is diametrically opposed to his findings as recorded on 13 November 2020, this court cannot attach value to the Family Counsellor’s change of heart. It seems as if the Family Counsellor slavishly followed Ms. Fourie's report once it became available.

Report of Dr. Van Zyl

[32] After receiving Ms. Fourie's report, and specifically because Ms. Fourie's report indicated that the respondent might present strongly with narcissistic traits, the respondent consulted with Dr. Van Zyl. Because I am of the view that Ms. Fourie's report does not substantiate a finding that the respondent is not fit to be the minor children's primary caregiver, and the fact that Ms. Fourie's findings regarding negative personality traits exhibited are coaxed in very relative terms because she used words like 'tend to be somewhat' and 'may sometimes appear to,' I am not going to deal with Dr. Van Zyl's report except to acknowledge that he reported that his test results do not suggest any clinically psychological symptoms and that the respondent's psychological functioning does not pose a risk to the wellbeing of the minor children. The report does not take the matter any further, but I am of the view that the respondent was not overzealous in consulting Dr. Van Zyl or placing his report before the court.

Discussion

[33] Although three years have passed since the parties agreed that the children's primary residence and care be awarded to the respondent, an agreement supported by the fact that the respondent was the children's primary caregiver,

the children, of whom two are daughters, are still very young. The respondent's decision to relocate to Maasstroom without consulting with the applicant or, if he did not agree, to approach the court for an order, led to the saga that culminated in the hearing of 16 April 2021. Although the respondent's conduct cannot be condoned, it can likewise not be the sole or decisive factor to consider in determining the future residency, care, and contact regime in the minor children's best interests. To continuously focus only on the respondent's rash relocation in June 2019 would be as unjust and unfair as to focus continuously on the grounds for the divorce. As stated above, both parties failed at times to put their children's best interests above their own. Ms. Fourie did not refer to the fact that the case manager had to intervene to ensure that the respondent and the children can leave Pretoria before 18h00 on the Fridays that she wanted to go to Maasstroom. The question needs to be asked whether it was in the children's best interest to spend two or three hours extra with the applicant but commute in the dark to Maasstroom? As indicated above, the blame for the children's anxiety and stress and the parties' inability to co-parent and truly put their children's best interest above their own is to be attributed to both parties in equal shares.

[34] It cannot be disputed that the children will be disrupted severely irrespective of the decision made regarding their primary residence, care and contact. They will be deprived of regular physical contact with a parent and his or her spouse either way. How the adults involved in this application deal with the reality of an amended contact and residency regime will determine whether this change will benefit the children or whether they will still be trapped in the trenches between warring parents. It can also not be disputed that the children benefitted immensely and will in the future benefit greatly from having their biological father involved in their lives. I am, however, not convinced that the children's rekindled attachment to the applicant inevitably led to him replacing the respondent as the children's primary caregiver. She remained the constant factor in their lives, despite their father's increased involvement over the last three years, and despite her effort to carve out an independent life in Maasstroom. The respondent

convinced the court that she would be able to provide a safe and secure environment for the children.

[35] The fact that Ms. Fourie perceived that L[…] and L[…] perceived their mother as moving away from them or being emotionally absent can be ascribed to the fact that the respondent had to keep several balls in the air since June 2019. The applicant, on the other hand, became exponentially more involved in the children's lives and met the innate need of every child to be acknowledged and cared for by its father. Due to Covid and the lockdown, the applicant was homebound, but his availability since March 2020 cannot be considered the template for his future availability. Even if it is accepted that he will not be away from home as often as during the existence of his marriage to the respondent, the applicant's line of work requires of him to attend trade shows and (at the bare minimum) the occasional hunt, a fact attested to by his attempt to pre-arrange the weekend and holiday schedule at the end of 2019 in anticipation of activities to be planned for 2020. The year 2020 can hardly be regarded as the norm in light of global disruptions brought about by the Covid-pandemic.

[36] It is evident from the documents filed of record that the applicant seeks primary residence and care based on the respondent's decision to relocate. He had extensive contact with the children in a residency regime that basically boiled down to a shared residency regime. He promotes the benefits of a shared residence regime throughout. Ms. Fourie's recommendation that the applicant must be rewarded primary care follows the reality of the respondent's decision to relocate to Maasstroom and the applicant's decision to remain in Pretoria, although she found the applicant to be the parent with whom the children are emotionally bonded. As indicated above, I believe that despite the applicants' dedicated attention and involvement over the past three years that resulted in his children reconnecting with him, the parties' different parenting styles and continued acrimony contributed to the children's stress and anxiety. I agree that the children will suffer a loss if they cannot interact with him daily, but they will

also benefit from not being confronted with the constant discord between the parties. The quality of the applicant's continued involvement rather than the quantity of time spent will ensure that his bond with the children remains intact and grows stronger.

[37] Primary care and residence are not primarily based on whether a parent resides in the city or a rural area. Both living environments have their own advantages and disadvantages. The respondent adequately indicated that the children would receive proper schooling in their formative years, that there is remedial assistance and therapeutic support at hand, and that they will not be prejudiced by being brought up in a rural environment. I am also mindful that the applicant stated that he could structure his working hours, predominantly work online, and spend a substantial portion of his time on his family farm in Alldays. He will be able to maintain regular and frequent contact with the children. As indicated at the onset of this judgment, children's needs can change. When they reach the age that they must go to high school, or any other pressing issue requires it, the residency regime can be revisited.

[38] I am alive to the fact that the Family Counsellor, independently from Ms. Fourie, indicated that J has a stronger emotional bond with the applicant than with the respondent. I have to consider J's age, and I have to consider that although it is not dealt with by either of the expert witnesses, J's continuous and almost ever-present support structure is his two sisters. It would not be in any of the minor children's interest at this stage to separate their primary residence and care.

Striking out application

[39] The applicant seeks the striking out of several paragraphs of the respondent's supplementary affidavit. He contends that it is repetitive and deals with events preceding the deposition of the answering affidavit. I am not going to deal with this application extensively, save to say that both parties are guilty of repeating themselves. The pot cannot call the kettle black. The application is dismissed.

Costs

[40] In matters where children's best interests are at stake, where parent's desperately vied for primary residence, and specifically in circumstances where it is evident that both parents love their children and care for their children, courts should be slow to grant costs orders. There are no victorious parties in family law litigation. Since I am of the view that both parties are to blame for the continued acrimony between them that ultimately underpins this litigation, I am of the view that each party should be responsible for their own costs.

Proposed order

[41] Both parties were invited to provide two draft orders catering for circumstances where the applicant and respondents are respectively successful. The applicant's proposed draft order in the event that the respondent is successful contained a substantial amendment of the settlement agreement beyond the scope of the arguments proffered. I am of the view that an order cannot encompass aspects that were not canvassed before the court. Mindful of the extent of litigation that has already ensued, the parties are invited to approach the case manager for a directive to hear a substantive application if they cannot agree to the further extent to which the settlement agreement is to be varied due to the respondent's relocation, if at all, or regarding the terms of paragraph 5 of the order.

[42] **For a child, being carefree is intrinsic to a well-lived life. Mr. K[…] and Mrs. M[…], with their spouses and extended family, have the opportunity and means to ensure that L[…], L[…], and J grow up in a carefree environment. They are to take their responsibility to provide a carefree environment for the children seriously. How they behave towards each other and react to another party's perceived acrimony are pivotal to their children's wellbeing. All the affected parties should heed the wise Solomon's words – 'A gentle answer turns away anger, but a harsh word stirs up wrath.'**

Order

In the result, the following order is made:

1. The respondent is granted leave to relocate with the minor children to Maasstroom, Limpopo.

2. Clause 3 of the settlement agreement, made an order of court on 16 October 2018, is amended to read as follows:

2.1. The primary care and the primary residence of the three minor children born from the marriage between the applicant and the respondent shall vest with the respondent in Maasstroom subject to the applicant's right of contact to minor children.

2.2. The applicant's right of contact to the minor children shall include:

2.2.1. Every alternative weekend from Friday afternoon after school until Sunday at 17h00 when the applicant shall return the minor children to the respondent's residence.

2.2.2. Wednesday afternoons after school until 17h00 when the applicant shall return the minor children to the respondent's residence, subject to the minor children's school and extramural activities, and subject to the applicant's availability.

2.2.3. Telephonic contact (including other electronic devices) every Tuesday and Thursday evening between 18h30 and 19h00.

2.2.4. Telephonic contact (including other electronic devices) on the Sundays when the applicant does not exercise weekend contact between 18h30 and 19h00. The telephonic contact provided for in 2.2.3 and 2.2.4 shall apply *mutatis mutandis* when the children are in the applicant's care.

2.2.5. Removal of the minor children every short school holiday and returning the minor children to the respondent's residence or as otherwise agreed, no later than 17h00 one clear day prior to the commencement of the new term, subject to any formal school- or sports activities, and subject to any arrangement in place for the short school holiday that commences in April 2021.

2.2.6. The right to remove the minor children for half of every long school holiday, Christmas and New Year to rotate between the parties. In the event of the applicant removing the minor children for the first half of the holiday, he may collect the children after school on the day the holiday commences. In the event of the applicant removing the children for the second half of the holiday, he is to return the children to the respondent's residence or, as otherwise agreed, no later than two days before the commencement of the new school term.

2.2.7. The children's birthdays are to alternate each year between the parties, subject thereto that it shall not unreasonably interfere with the minor children's school, sporting, extramural, and/or social events.

2.2.8. Weekend contact shall be exercised in such a manner that the minor children spend the weekend of Mother's Day with the respondent and the weekend of Father's Day with the applicant, irrespective of whether the children spend consecutive weekends with the same parent.

2.2.9. Contact with the minor children on the birthday of the applicant subject thereto that it shall not unreasonably interfere or disrupt the minor children's school, sporting, extramural or social events.

2.2.10. If a public holiday immediately precedes or follows upon a weekend, such public holiday shall be deemed to form part of the weekend, and the party who is entitled to have the children with him/her over that weekend shall have them with him/her on that public holiday. If a public holiday falls within a school holiday, the children will remain with the party in whose care they are for the weekend or holiday. The remainder of public holidays shall be shared equally between the parties subject to the terms of this order.

2.2.11. Any such further contact as the parties may agree upon including sleepover contact subject thereto that if the minor children have a school, sporting, extramural and/or social responsibility and/or event during the contact period, the applicant shall ensure that the minor children attend such responsibility and/or event.

3 The minor children shall attend therapeutic sessions by an appropriately qualified therapist or psychologist nominated by the respondent to assist them with the change in their care and residence. The parties are liable on a 50/50 basis for the costs occasioned in this regard.

4 The minor daughters are to receive speech therapy, and the parties shall be liable on a 50/50 basis for the costs in this regard. The respondent is to nominate the appropriate therapist.

5 The social worker, Ms. Irma Schutte shall continue to assist the applicant and the respondent in resolving disputes as parental coordinator. The parties shall provide their full co-operation to Ms. Schutte, including submissions to directives issues by her and the payment of her costs on a 50/50 basis until such time as the Court directs otherwise, a*lternatively* the parties agree otherwise.

6 The parental coordinator Ms. Schutte, or any substitute parental coordinator agreed on by the parties or appointed by the Court, alternatively, a suitably qualified mediator nominated by Ms. Schutte or such substitute parental coordinator shall first attempt to mediate any dispute regarding the parties' respective maintenance contributions towards the minor children and the parties shall be liable on a 50/50 basis for the costs in this regard, before any of the parties approach the appropriate Court.

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E van der Schyff

Judge of the High Court, Gauteng, Pretoria

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by e-mail. The date for hand-down is deemed to be 23 April 2021.

Counsel for the applicant:	Adv. L Haupt SC
With:	Adv. T Cooper
Instructed by:	Riaan Louw Attorneys
Counsel for the respondent:	Adv. S Liebenberg
Instructed by:	Alice Swanepoel Attorneys
Date of the hearing:	16 April 2021
Date of judgment:	23 April 2021