REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 874/2022

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

SIGNATURE: Makoti AJ

DATE: 12/02/2025

In the matter between:

D[...] J[...] M[...] Applicant

(7[…])

And

N[...] M[...] Respondent

(Born D[…] P[…]) (8[…])

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 12 February 2025.

JUDGMENT

Makoti AJ

Introduction

[1] This application first served before court and an order was granted on 15 September 2023. The court order was for the appointment of a clinical psychologist (Mr Basil Russel Carnie) to investigate and opine on the best interests of a minor child born of the parties. The minor child in question, D[...] J[...] M[...] (the minor child), was born in wedlock between the parties on 10 September 2020.

[2] A report of the clinical psychologist has since been delivered on 20 February 2024 (the report), with recommendations on the best modes of parental contact with the minor child. That having been done, the parties are still at odds on how they will work together to ensure the minior child has adequate and beneficial contact with both of them. What presents before me is the question of contact with the minor child as well as the issue raised in reconvention for contribution to the costs of the litigation.

Report on the best interests of the minor child

[3] There is some history to the matter. Voluminous documents have been filed which rendered the acrimony between the parties quite palpable. Withing such volumes the court had to read through unnecessary stuff as they apportioned blame against each other. The present dispute in respect of care and contact with the minor has been considered by the Family Advocate as well as by the clinical psychologist, Mr Carnie. The report of the Family Advocate was issued dated 28 February 2023. Then, a year later followed the report that was composed by Mr Carnie, the psychologist. I will

not dwell much into the contents of the reports, save for paying attention to their recommendations.

[4] In my observation the reports are not mutually exclusive, and their compilers laboriously took their time to address the best interests of the minor child, factoring, importantly, the current age of the child. I paraphrase the recommendations by the Family Advocate which state in essence that:

> [4.1] primary residence of the minor child should be with the mother, the respondent;
>
> [4.2] parental rights and responsibilities be retained for the father, the applicant, who shall be entitled to:
>
> [4.2.1] have contact with the minor child on alternate weekends (Friday after school to Sunday afternoon);
>
> [4.2.2] have the minor child visiting him on alternate short school holidays. Long school holidays be shared equally between the parents;
>
> [4.2.3] parties to make arrangements for special days such as the child's birthday celebrations, subject that, where possible, the child shall spend time with each of the parents on their birthdays;
>
> [4.2.4] telephone contact at reasonable hours;
>
> [4.2.5] equal sharing of travelling costs.

[5] The respondent was not satisfied with and she rejected the recommendations of the Family Advocate. Then the applicant approached court for an order authorizing a fresh investigation by the psychologist. As I have already mentioned, this was done a report was produced on 20 February 2024. After his investigation of the minor child's situation Mr Carnie recommended *inter alia* that:

[5.1] parental rights and responsibilities be shared equally between the parties;[1]

[5.2] primary care and residence be to the respondent;

[5.3] gradual phased-in care and contact by the applicant with the minor child with the parents. These include:

[5.3.1] the minor child's visitation to the father's residence in the Western Cape on alternate weekends;

[5.3.2] for a period of six months, the applicant be allowed to exercise contact with the minor child in the Western Cape, from Friday afternoon (15H00) to Sunday (17H00). Public holidays to be included when the fall on a Friday or on a Monday;

[5.3.3] that telephone contact on Mondays, Wednesdays and Saturdays to be negotiated in respect of practicality of the time which should not interfere with the minor child's established routines.

[6] Unlike the Family Advocate (FA), the clinical psychologists made no recommendations in respect of the times that the minor child will spend with either of the parents during school holodays, whether long or short. This approach was motivated by his recommendation that:

"5.8 In keeping with the principle of gradual and therefore phased-in contact arrangements, it is recommended that only after six (6), that is, from date of onset of the recommended contact arrangements, should the contact arrangements in point 5.7 be made subject for review by the appointed Parenting Co-ordinator. Only then should an increase in contact be considered and therefore on the basis of an informed opinion."

[1] Section 18-20 of the Children's Act No. 38 of 2005.

[7] One would have thought that, armed with the two reports which are not mutually exclusive, the parties would be in a position to co-operate for the sake of their minor child. That said, the acrimony between the parties is palpable and need not be entertained at this stage. My ultimate goal being to see to it that the minor child's interests remain fundamental to the adjudication of this application.

[8] There are few matters to consider. The first is that the distance between the parties' residences (Limpopo and Western Cape) are vast and will render it difficult to strictly follow the times recommended by the FA. Mr Carnie, on the other hand, made accommodations which will make it easier for the parties to exercise their respective rights of contact with the minor child in the Western Cape. At best, his recommendations should be seen as allowances and insignificant departures from the general outcomes and recommendations of the FA, which should be accommodated for the ultimate benefit of the minor child.

[9] What Mr Carnie has recommended in respect of the phased-in approach, particularly in respect of contact during school holidays seems more practical in comparison to the approach that was followed by the FA, upon whom I lay no criticism at all. As I have already intimated, both reports are important to move us forward in an attempt to address the important question to the benefit of the minor child.

The law on contact and care for minor children

[10] Promotion and protection of the best interests of minor children are constitutional virtues,[2] never to be abdicated. When promoting and protecting the best interests of a child the court has to transcend above the squabbles of the parties and pursue what is, in its considered view, the best position for the minor child concerned.

[2] Section 28 of the Constitution.

[11] The best interests of the minor child is a fundamental principle that is espoused in the Children's Act. The statute repeatedly mentions the principle to signify the importance of issues which are related to the welfare of minor children in the Republic. In addition, the court as the upper guardian of minors is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the paramount issue of where lies the best interests of the child.

[12] When a court sits as upper guardian in a custody matter, it has extremely wide powers in establishing what is in the best interests of minor or dependent children. In *AD and DD v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)*[3] the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interests of minors should not be *'held to ransom for the sake of legal niceties*' and held that in the case before it the best interests of the child 'should not be mechanically sacrificed on the altar of jurisdictional formalism'.

[13] Section 9 of the Children's Act enjoins the court to, in all matters concerning contact care and welfare of minor children, ensure that the best interests of the child are kept paramount. Children are regarded as vulnerable people who lack the means to act in their own interests. Also, the Children's Act makes no secret in its preamble that it aims to achieve the protection of the interests and rights of minor children:

> "… leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities."

> "… full and harmonious development' of their personalities and should be permitted to grow up in a family environment and in an atmosphere of: 'happiness, love and understanding."

[14] When making a decision about the minor child's best interests, it is impossible to not attach any weight to the age of the minor child. He was born in 2020 and has

[3] 2008 (6) SA 38 (CC).

not yet turned five years old. Without discounting the mutual love with his father, he is at the moment largely dependent on the respondent as a care giver for his survival and will continue to be so for some considerable time.

[15] The minor child is still at an impressionable age. In my view, therefore, and having considered the reports of the FA and Mr Carnie, it would be in the best interests of the of the minor child will be served if he traverses most of this period of his life whilst being cared for by the respondent as the primary care giver, with the applicant having contact with him in the manner that has been suggested by Mr Carnie in particular. The changes of contact regime shall evolve with time, and subject to review that shall be conducted from time to time.

[16] I have noted that the respondent to a great extent accepts Mr Carnie's recommended phased-in approach. This is progressive in my view, and it will take care of the minor child's immediate interests if the recommendations of Mr Carnie are given effect to.

[17] The applicant, on the other hand, appears to want to shift things by asking for another assessment of the minor child, this time by an expert who is referred to as Louis Awerbuck who is to assess him regarding the physical, mental and emotional well-being. That has since shifted and the applicant accepts the outcomes of an assessment done by Mr Carnie. It will be recalled that Mr Carnie's services were procured pursuant to the court order and his report, read together with the one composed by the Family Advocate, is helpful to move the matter forward.

Claim for contribution to legal costs and maintenance *pendente lite*

[18] Courts take a number of factors into consideration when faced with an application under Rule 43 for a contribution towards legal costs. The factors include the financial means of the parties, the complexity of the divorces action, and the reasonable estimate for legal representation. A party that has bigger means is normally called on to contribute to the legal costs of the one who has lesser means.

[19] A party seeking contribution towards legal costs by another party must substantiate why they are entitled to the amount they claim. In this case the evidence presented by the applicant is not persuasive enough for the relief sought. In my view, the applicant did not provide clear information regarding where she gets financial assistance, only going as far as saying she is assisted by her mother. This, after she indicated that she is a businesswoman, but without disclosing the amount of income that she draws from any business that is conducting.

[20] The principle is that:

> "[17] The parties are entitled to litigate on the same scale, commensurate with the means of the parties during the subsistence of the marriage. *Glazer v Glazer* 1959 (3) SA 928 (N). In respect of the quantum of contribution, the court takes into account the scale upon which the applicant intends to litigate, which scale is determined with due regard to the respondent's financial position and the parties' standard of living throughout the marriage relationship - *Nuhlman v Nuhlman* 1984 (1) SA 413 0N)."

[21] The respondent merely asserts in both her answering and supplementary affidavits that she is a business woman, but has not shared much information to enable the court to determine if contribution is warranted and, if so, how much should be awarded. The part in which she makes a case for contribution is tersely worded and unhelpful. She says inter alia the following:

> "11.1 The litigation instituted by the Applicant is vexatious which is clear from the papers in that he prays that primary residence of the minor child should be with the Applicant and the Respondent must exercise reasonable contact rights with the minor child."

[22] In *H v H*[4] Victor J profoundly said that:

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[4] Case No. 44450/22, 30 September 2022, at par 3.

> "… it is without doubt clear that the dispute about the care of children, the interim maintenance, and the contribution of legal costs must be viewed through the prism of the Constitution and of course in relation to the Children's Act."

[23] Contribution to legal costs concerns the balancing the competing intersts of the parties and ensuring that equality is achieved in the context of legal proceedings.[5] No one party should have the upper hand due to having better financial means than the other. It is also a matter of the parties continuing the reciprocal duties towards one another while the marriage still subsists.[6] Author *Kruger*[7] posited the issue thus:

> "From its beginning until its termination, a civil marriage imposes a reciprocal common law duty of support on the spouses, provided that the spouse who claims maintenance needs it and the spouse from whom it is claimed, is able to provide it. Maintenance includes the provision of accommodation, clothing food, medical services, and other necessaries. The scope of the duty of support is determined inter alia by the social status of the parties and their means of income and the cost of living."

[24] The respondent seeks contribution in the amount of **R260 720-93** (Two Hundred and Sixty Thousand, Seven Hundred and Twenty Rand, and Ninety-Three Cents). For the court to make a determination it needs to sit with objective evidence of the parties' respective means. I have no idea of her means and, importantly, the means of the applicant. As a result, I am not in a position to determine where to award contribution and, if so, the amount, assuming that she is entitled to such contribution.

[25] Turning focus to the question of maintenance for the minor child and the respondent, she has asked for an amount of **R6 380-00** (Six Thousand, Three

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[5] VR v VR 2019 par 17.
[6] Charmani v Charmani 1979 (4)S 8043 (W) at 806 F-H, also Van Rippen 1949 (4) SA 634 (C).
[7] South African Family Law, 4th ed, 2017 p44 at 5.4.1.

Hundred and Eighty Rand). She also ask for maintenance for self in the amount of **R9 544-89** (Nine Thousand, Five Hundred and Forty-Four Rand and Eighty-Nine Cents). In this one too, I have not been provided with the means of the parties. I am left without objective information to enable me to decide the issue.

[26] With the risk of repetition, I needed to have been taken into the respondent's confidence by her making a full disclosure of the extent of the earnings that she derives from her business(es). That would have helped me to understand her financial position as against that of the applicant. With such information I would have been in a position to determine some parity between her and the applicant in furtherance of the litigation by awarding her an amount as contribution.

[27] There is an existing maintenance order in place that was granted for the benefit of the the minor child. The amount was set at **R5000-00** and I don't believe that it is opportune to disturb the current arrangement.

Order

[28] I make the following order:

[28.1] parental rights and responsibilities shall be shared equally between the parties;

[28.2] primary care and residence of the minor child shall be with the respondent;

[28.3] for a period of six (6) months from the date of this order, there shall be gradual phased-in care and contact by the applicant with the minor child with the parents, that:

[28.3.1] the applicant shall have the minor child's at his (father's) residence in the Western Cape on alternate weekends;

[28.3.2] the order in terms of 28.3.1 above shall be reviewed by a Parental Coordinator after the lapse of a period of six (6) months; save that during that period of six months the applicant shall be allowed to exercise contact with the minor child in the Western Cape, from Friday afternoon (15H00) to Sunday (17H00), which may incorporate public holidays when the fall on a Friday or on a Monday;

[28.3.3] the applicant shall have the right to remove the minor child on Father's Day, from 09H00 to 17H00 when such day does not coincide with an already prearranged weekened of his contact with the minor child;

[28.3.4] the respondent shall have contact with the minor child on Mother's Day, from 12H00 onwards when such day coincides with a weekend during which the applicant is prescheduled to have contact with the minor child;

[28.3.5] if the respondent's birthday falls on the weekend of the applicant's contact with the minor child, the respondent shall be entitled to exercise contact with the minor child for a period of three (3) hours and at a venue near where the applicant is exercising contact with the minor child;

[28.3.6] the applicant shall have telephone contact with the minor child at reasonable times on Mondays, Wednesdays and Saturdays; which time shall be agreed to by the parties in respect of the practicality of the time which should not interfere with the minor child's established routines.

[28.4] A suitable Parenting Coordinator to be agreed to by the parties shall be appointed after the lapse of a period of six (6) months of this order to:

[28.4.1] facilitate and supervise joint decision-making in respect of the affairs of the minor child, compliance with decisions taken and the provisions of this and other court orders which may be applicable;

[28.4.2] consider and make a ruling in respect of furture contact, including but not limited extension of contact, between the applicant and the minor child;

[28.4.3] the parties shall be liable equally to pay the costs of the Parental Coordinator;

[28.5] I make no order as to costs.

MOKGERWA MAKOTI
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

APPEARANCES:

HEARD ON:	**11 SEPTEMBER 2024**
JUDGMENT DELIVERED ON:	**12 FEBRUARY 202**
FOR THE APPLICANT:	**JOUBERT & MAY INCOPORATED** **C/O DDKK ATTORNEYS INC** **POLOKWANE**
FOR THE RESPONDENT:	**THOMAS GROBLER ATTORNEYS** **POLOKWANE**