

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No.: 7730/2014

In the matter between:

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

Applicant

and

A[...] T[...]

First Respondent

**THE FAMILY ADVOCATE:
KWAZULU-NATAL**

Second Respondent

J U D G M E N T

KOEN J:

[1] In this application the Applicant and the First Respondent respectively each claims that the primary residence of their minor child N[...] C[...] N[...], a girl born on [...] 2005 ('the minor child'), be awarded to them.

[2] The minor child has resided primarily with the Applicant since July 2011. This was pursuant to a court order which was granted at that time based, in the main, on allegations of alleged sexual assault on the minor child by a boyfriend of the First Respondent. This relationship between the First Respondent and the boyfriend has since terminated during November 2011. The First Respondent will however have to have some interaction with the boyfriend in the future as a boy was born from their

relationship. Criminal charges were preferred against the boyfriend but he was acquitted by the Regional Magistrate on the 28 May 2014.

[3] The First Respondent argues, with reference to *inter alia* the reasons for such acquittal that the charges were contrived by and probably instigated by the Applicant and his mother, the minor child's paternal grandmother, which would not make it in the best interest of the minor child to remain in their primary care in Durban. She has also placed considerable reliance upon various reports by a clinical psychologist Terence Dowdall who has observed the minor child both in Durban and in the Cape where the First Respondent resides in Fishhoek and who has expressed the opinion that the primary residence of the minor child should be awarded to the First Respondent.

[4] The matter has also been referred to the Family Advocate and pursuant to interviews conducted by the family counsellor Kubesh Reddy, the Family Advocate recommended that:

- (a) The Applicant and First Respondent remain co-holders of parental responsibilities and rights in respect of the minor child;
- (b) That the minor child primarily reside with the Applicant;
- (c) That the First Respondent exercise reasonable contact with the child as follows:
 - (i) Both short school holidays and the June/July school holidays;
 - (ii) Sharing of the December/January school holidays;
 - (iii) Daily telephonic contact at reasonable times;
 - (iv) Skype contact as often as possible;
 - (v) If possible for the First Respondent to exercise, the child to be with the First Respondent on Mother's day;
 - (vi) If possible for the First Respondent to exercise, the parties to share the child's birthday;
 - (vii) Any additional contact to be by arrangement and agreement between the parties;
- (d) That the contact is conditional on the First Respondent ensuring that whilst the minor child was having contact with her, her ex-boyfriend, Mr M[...] does not have any contact with the child.

In a further report dated 20 October 2014 by clinical psychologist Hameeda Bassa- Suleman the view was expressed that it will be in the minor child's best interest to have primary residence in Durban with the Applicant and her paternal grandmother as she has developed healthy, sustainable relationships with those around her at school, with her friends and at home with her father, grandmother and paternal relatives. She has also felt safest and most secure in Durban and has always seen Durban as a place of safety and security for her. It is however recorded that the minor child should have access/contact to her mother in Cape Town and that all efforts should be made to try and repair and sustain the maternal relationship. A proviso is however expressed that prolonged exposure to residing in Cape Town can cause the minor child to regress and become re-traumatised and that care should be given with regard to this.

[5] The First Respondent has been critical of the recommendations and the basis for the recommendations of both the family advocate and the views expressed by Ms Bassa-Suleman. Some of these criticisms may well be justified as are criticisms which were voiced by the Applicant in respect of the recommendations of Mr Dowdall. In view of the conclusion to which I have come I do not intend summarizing these arguments or expressing any view thereon.

[6] Primary residence can perhaps be best equated to the day to day care and management which was also inherent in the previous concept of custody.

[7] The practice in this division has long recognised that disputes as to custody should not generally be resolved by way of application procedure. Paragraph 16 of the Practice Manual in this division has accordingly recognised that in regard to the 'variation of custody orders' that 'proceedings for the variation of a custody order are to be by way of action and not by way of application save where the variation is by consent or to give legal recognition to an existing *de facto* variation of long standing'. The reasons for that practice are obvious and well founded.

[8] It seems to me that stability is a very important consideration in deciding what is in the best interest of the minor child. Obviously it is not conclusive but it must be properly considered and weighed against evidence which might be advanced in favour of relocating the child from what she had become accustomed to over the last three years. Deciding this issue should follow on a proper ventilation, with full cross examination, of all the relevant evidence available and sought to be adduced, and not left to inferential reasoning.

[9] The Applicant's counsel has argued that primary residence should be awarded to the Applicant but has recognised that there are real and genuine disputes of fact on the central issues to be determined both in the main application and the counter application which cannot be determined on the papers, and therefore warrants the matter being referred for hearing of oral evidence for it to be determined.

[10] When it comes to the best interest of a minor child, there is very little room to adopt a robust approach to these kinds of disputes. The Applicant accordingly prepared a draft order requesting that the matter be referred for hearing of oral evidence on the following issues:

- (a) Which of the parties (Applicant or First Respondent) should the minor child, primarily reside with;
- (b) The terms of contact which either party whom the minor child does not primarily reside with shall have to the minor child.

Both these are not really issues of fact but conclusions of law.

[11] The Applicant commenced the application more on the basis that the minor child has resided with him primarily and that this was hence an arrangement of some standing.

[12] It seems to me that where primary residence is now the controversial and hotly contested issue, that there is no reason to depart from the practice in this division that such an issue be determined in an action, to enable both parties to plead the specific grounds and basis upon which they wish to rely in support of such claim of primary residence in a comprehensive manner.

[13] In my view there are disputes of fact and there are issues arising which require the witnesses who have deposed to affidavits to date to amplify their reasons for making certain recommendations and to be cross-examined on other statements which are advanced in support of the conclusions they have motivated. I have considered whether the ambit of such dispute could be confined to factual issues in dispute, but have concluded that the interests of justice and the best interest of the minor child require that all these issues be ventilated in a trial.

[14] The matter is accordingly referred to trial. The Applicant's notice of motion shall stand as a combined summons. The Applicant is directed to deliver a declaration in support of his claim for primary residence and outlining what he contends will be in the best interest of the minor child in regard to contact with the First Respondent, within 20 days of this order. Thereafter the Uniform Rules of Court shall apply to the exchange of further pleadings. The costs to date are reserved for determination by the court hearing the action.

[15] In the interim pending it seems that the parties are largely agreed on the contact arrangements which the First Respondent is to enjoy to the minor child, that is in accordance with the recommendations of the family advocate outlined above. It accordingly seems that no order is required in respect thereof. I accordingly refrain from making any such order and leave it flexible for arrangement and agreement between the parties. My failure to do so should not however be construed as an endorsement of the family advocate's recommendations.

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