

REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO: 2011/34598

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

Date:_____ **Signature**_____

In the matter between

V S B

Applicant

And

H L

Respondent

J U D G M E N T

MOSIKATSANA AJ

Introduction:

[1] This is an application by the biological father for defined visitation rights in respect of his biological daughter, M (the minor child), in accordance with a parenting plan outlined in the attached draft order marked “X”.

[2] The applicant also seeks an order against the respondent for the costs of the application and the appointment of the nominated child expert, Ms Robyn L Fasser

[3] The application for costs is opposed by the respondent, who is the biological mother of the minor child. She also seeks an adverse costs order against the applicant.

Background and Common Cause:

[4] The parties were married on 18 February, 2007 according to Hindu religious law. A minor child was born of the marriage on 18 September 2009. The relationship between the parties broke down acrimoniously. They separated on 9 December, 2010. The current dispute over the applicant seeking visitation with the minor child is a corollary of the failed relationship between the parties.

[5] Pending the outcome of this application for defined visitation rights and responsibilities by the father, there have been two separate interlocutory proceedings, to determine the appointment of appropriate child experts to assist the court in determining the suitability of the applicant for unsupervised child visitation.

[6] The first interlocutory application was opposed by the respondent on the basis that the interlocutory application was premature as the matter was not ripe for hearing and that the court can only exercise its discretion to appoint an expert to assist the court in these matters

pursuant to s 29(5) of the Children's Act 38 of 2005 "for purposes of the hearing" only when the matter is ripe.

[7] On 1 February, 2012 the Honourable Sutherland J, granted an order in the first interlocutory application directing inter alia that:

[7.1] Advocate Green "nominate... an appropriate child expert to investigate ... access by the Applicant to the minor child";

[7.2] The nominated child expert "will investigate, and render a report and recommendations ... to the Court and the Office of the Family Advocate for consideration in respect of its findings in the pending application by the applicant for access to the minor child".

[7.3] Both parties cooperate fully with the nominated child expert; and

[7.4] The costs of the child expert will be paid by either party or both of them, and that the costs will be costs in the main application.

[8] The nominated child expert is Ms Fasser, whose recommendations were submitted on 11 May 2012.

[9] On 18 October 2012 the matter came before the Honourable Collis AJ for determination of the applicant's defined visitation rights in respect of the minor child.

[10] In opposing the hearing of the application for the applicant's defined visitation rights and responsibilities, the respondent raised a point in limine, that Ms Fasser's recommendations had not been submitted to the Office of the Family Advocate as ordered by the Honourable Sutherland J, and that it would have been premature for the Court to consider Ms Fasser's recommendaions before they have been commented upon, by the Family Advocate.

[11] The respondent's point in limine was upheld by the Honourable Collis AJ on 31 October, 2012 directing that the office of the Family Advocate render an opinion on the report prepared by Ms Fasser, and that the Family Advocate's report, when completed, must be forwarded to this Court. The court proceedings in the main application for defined visitation were stayed pending the recommendations of the Family Advocate.

[12] The office of the Family Advocate has since submitted two memoranda including a joint Supplementary Memorandum of the Family Advocate and the Family Counsellor. The Family Advocate and the Family Counsellor have made specific recommendations to which the parties have agreed.

[13] The application is presently before this court for determination of the application as set out in paragraph [1] above.

Issues for Determination

[14] The issue of child visitation is settled between the parties in terms of a draft order and parenting plan marked "X". This Court is now required to determine whether the draft order serves the child's best interests.

[15] The Court is also required to determine an appropriate order for costs.

Is the Draft Order and Parenting Plan in the Child's Best Interests?

[16] Child visitation disputes are often exacerbated by an acrimonious emotional atmosphere, caused by the parents' failed romantic relationship. After an unpleasant separation, the animosity the parents feel towards each other can make it difficult for them, to agree on child visitation issues without court intervention. Unfortunately, when parents cannot resolve child visitation issues amicably, the child is the one who suffers most.

[17] According to 28(1)(b) of the Constitution the right to parental care which includes child visitation, is the right of the child and is not to be viewed solely from the often jaded vantage point of the conflicting parents. The child's right to visitation and the circumstances in which it occurs must be viewed principally from the vantage point of the child. The Court in deciding child visitation matters must be guided, by the best interests of the child as previously articulated in *Mc Call v Mc call* 1994 (3) SA (C) and currently codified with some modification in section 7(1) of the Children's Act 38 of 2005 (Children's Act) read with s 28(2) of the Constitution of the Republic of South Africa, Act 108 of 1996 (Constitution).

[18] In the instant case, it was never in dispute that the applicant is entitled to child visitation consistent with section 21(1(a) of the Children's Act. The dispute mainly centred on the degree of and the circumstances in which child visitation should be granted.

[19] After much vituperation and rancour about the form of access that the applicant should be afforded, the parties eventually reached consensus on what is in the child's best interests. The parties duly submitted a parenting plan which complies with the formal provisions of sections 33 and 34 of the Children's Act, which they seek to make an order of this Court.

[20] It is my view that the parenting plan does not only conform with the formal requirements of sections 33 and 34 of the Children's Act, but that it also serves the child, M's best interests.

COSTS:

[21] The only point of dispute is with regard to costs. The parties have blamed each other for the delays in bringing this matter to a close. However, it must be observed that the delays occasioned inter alia by the interlocutory proceedings were not entirely without merit.

[22] It is creditable to both parties, that they finally put aside their petty differences, and focused on what is in the child's best interests, by settling the matter in terms of the draft order and parenting plan marked 'X'.

[23] In my view an adverse costs order would be inappropriate. Unlike most legal disputes where the litigants never see each other after their matter has been settled by the court, child visitation disputes are unique in that they are never final. The parties will continue to seek each other's cooperation long after the Court has rendered its decision.

[24] It is my view that in high-conflict child visitation disputes such as the present, an adverse costs order may inflame the already abating conflict by creating the illusion of a "winner" and a "loser". Any costs order in child visitation disputes, in my view, must take this into account.

The Order:

[25] In the result I make the following order:

[25.1] An order is granted in terms of the draft order and parenting plan which are hereto and marked "X"

[25.2] There is no order as to costs.

TL MOSIKATSANA AJ

APPEARANCES:

Applicant's Attorney

FIONA MARCANDONATOS

Applicant's Counsel

ADVOCATE SAMANTHA JANE MARTIN

Respondent's Attorney

CHIBA-JIVAN INC

Respondent's Counsel

ADVOCATE R SHEPSTONE

DATE OF HEARING

24 MARCH 2014

DATE OF JUDGMENT

1 SEPTEMBER 2016