IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **18545/2016**

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: FINAL
Date: …7 April 2021

In the matter between:

H[....] S[....] Applicant

and

N[....] DS S[....] Respondent

JUDGMENT

TURNER AJ:

[1] Divorce is destructive, by design. It normally begins with dissatisfaction, criticism or rejection and the entire procedure the parties then embark on is aimed at bringing the marriage relationship to an end and terminating the parties' status as married persons. The parties and practitioners involved in the furore of the split are required to provide for the children but often overlook the importance of designing and implementing a framework on which each child can build his or her life with the benefits and support of both parents, living apart.

[2] This is a matter in which the divorced parents appear to have taken account of their obligations to their young daughter by signing agreements in which they purport to recognise and commit to principles critical to building the required framework for her future. However, it seems that their inability or unwillingness to shelve the dissatisfaction and criticism of one another has had the result that they have not properly understood, adopted or implemented those principles, leading them straight back to the destructive arena of litigation.

[3] In circumstances where their daughter is just 7 years old and has all the trials and tribulations of puberty and teenage years ahead of her, it is my view that the parents should be made to try harder at finding a compromise which works for their daughter and respects the role of the other in her life. They should not be permitted to ignore the principles they have committed to or to default to the costly and destructive tools of litigation to achieve their own preferences.

[4] The applicant and the respondent were married during March 2012 and their daughter, who I will refer to as DS, was born in December 2013. On 14 August 2015, they were divorced and the settlement agreement concluded between them was made an order of Court. In terms of this 2015 settlement agreement, the parties shared parental responsibilities and rights in regard to DS while DS was to have her primary residence with her mother, visiting her father on alternative weekends and on specified days during the week.

[5] In 2016, the applicant launched proceedings for a change in the arrangements. The applicant says he did so because he "*felt that DS should spend an equal amount of time with the respondent and me*." Those papers are not before me, but it is not disputed that that application led to an investigation being undertaken by the Family Advocate, assisted by the Family Counsellor. Following that investigation, a clinical psychologist, Dr. D Fasser, was appointed to conduct an assessment of the arrangements and to prepare a report. In April 2018, Dr. Fasser published her report (which runs to over 100 pages) in which various observations and recommendations are recorded.

[6] After considering Dr. Fasser's report, the parties entered into a further settlement agreement which varied the terms of the 2015 settlement agreement. New terms in relation to residency and other arrangements were formally recorded and this new agreement was made an order of Court on 6 September 2018 (the "2018 agreement").

[7] In terms of the 2018 agreement, after a phasing-in period, shared residency was implemented which involves *inter alia* an arrangement in which DS spends alternate weeks with her parents. The applicant and the respondent now live 8 minutes apart in the Hartebeespoort area (the applicant having moved to Hartbeespoort from Johannesburg during or about 2018) and DS attends the local primary school. The current parent contact and residency arrangements are set out in the 2018 settlement agreement and are dealt with below.

[8] On the information available to me, it seems that DS has a good and loving relationship with both of her parents and enjoys a secure environment in both households. Unfortunately, as is the case in so many matters, the relationship between the applicant and the respondent is acrimonious and they have not achieved the level of mature constructive communication necessary to resolve their differences without the intervention of others. While it is clear from the various reports and undisputed on the papers that DS receives parental love and attention from both of them, it seems that the absence of mutual respect and constant criticism of the other poses the biggest threat to DS's interests - dragging her into the fray and leading to the current proceedings.

[9] In this judgment, I will make remarks in relation to various allegations made in the papers but I wish to be clear at the outset that, in my view, the blame for the breakdown in communication is shared between both parents. Statements made in this judgment should not be interpreted as imposing sole or even primary responsibility for the *impasse* on one and not the other. They both need to work on improving the manner in which they engage with one another, for the sake of their daughter.

Relief and *in limine* matters

[10] In the current application, the applicant has amended his relief. In his original notice of motion, the applicant sought an order "*directing that Dr. Robyn L Fasser be appointed to conduct an assessment to determine the best interests of the minor child, DS S[....], with specific reference to the care and contact with the minor child and to provide a report*." In addition, he sought an order directing both parties to cooperate with Dr. Fasser and to contribute in equal shares towards Dr. Fasser's account.

[11] When delivering her answering affidavit, the respondent also delivered a notice of counter-application in which she sought: i) to delete two paragraphs in the 2018 agreement (relating to the allocation of a mid-week overnight stay with one parent while based at the home of the other); and ii) an order granting consent for her to relocate from Hartbeespoort to Muldersdrift, Gauteng and for DS to be enrolled at a primary school near to her proposed new residence in Muldersdrift. The respondent also sought condonation for filing her answer approximately 2 weeks late, the primary reason being her testing positive for COVID-19 during the relevant period.

[12] In response to this counter-application, the applicant introduced his amended relief. His amended notice of motion seeks to split the application into a "Part A" and "Part B". The "Part A" relief repeats the original relief and adds a request for an order "*granting the applicant and the respondent leave to deliver further affidavits once Dr. Fasser has rendered her report*." In Part B, the applicant seeks an order directing that the primary residence of the minor child be with the applicant, the respondent being given reasonable rights of access. I note that the intention to achieve the Part B relief had been stated in paragraph 4 of his founding affidavit, although it was not reflected in the original Notice of Motion. The applicant also opposed the respondent's application for condonation for the late filing of her answering affidavit.

[13] In the joint practice note delivered ahead of the hearing, the parties recorded, at paragraph 4.1 of the joint minute, that the three issues which require determination at this stage are the following: whether Dr. Fasser should be

appointed to conduct the said assessment; who should pay the costs of such assessment; and whether the respondent should be granted condonation for the late delivery of her answering affidavit.

[14] At the hearing of the matter, the following was resolved *in limine*: (i) the applicant withdrew his opposition to the respondent's application for condonation and condonation was granted; (ii) the applicant's amendment to his notice of motion was granted, without opposition; and (iii) the respondent confirmed that she would not proceed with the counter-application in the current hearing.

[15] The effect of all of this was that the issues raised in Part A of the applicant's amended Notice of Motion were to be determined, and the issues raised in Part B and in the counter-application would stand over for a later date.

[16] Notwithstanding the above *in limine* submissions, I indicated to counsel during argument that I was not willing to grant the relief claimed in Part A at this stage. I indicated that before the Court would even start a process to evaluate the need for a variation of the 2018 agreement, particularly whether DS should stop spending alternate weeks with her parents, the parties were required to engage in a structured process of parenting co-ordination, with oversight from the Court. As set out in my reasons below, the problem to be solved in the current dispute is not a problem involving the treatment of DS by either parent but the way in which they view and engage with each other. It is in DS's interest that this problem be addressed and that the Court and the parties follow an approach conducive to conciliation and problem-solving in doing so. This is what is required in terms of section 6(4)(a) of the Children's Act No. 38 of 2005 (the "Children's Act").

Legislative framework

[17] The Constitution of the Republic of South Africa, 1996, provides at section 28:

> "28 Children
> (1) Every child has the right -(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

…

(2) The child's best interests are of paramount importance in every matter concerning the child."

[18] Section 6 of the Children's Act sets out the general principles which are intended to guide the implementation of all legislation applicable to children and all proceedings, actions and decisions concerning a child and includes, in relevant part:

"(2) All proceedings, actions or decisions in a matter concerning a child must

(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;

(b) respect the child's inherent dignity;

(c) treat the child fairly and equitably;

….

(3) If it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child.

(4) In any matter concerning a child -

(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and

(b) a delay in any action or decision to be taken must be avoided as far as possible."

[19] Section 7 sets out the "*Best interests of child standard*" to be applied in these proceedings.

7 Best interests of child standard

(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

(a) the nature of the personal relationship between-

(i) the child and the parents, or any specific parent; and

(ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards-

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child-

(i) to remain in the care of his or her parent, family and extended family; and

(ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's-

(i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

(iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by-

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child. (emphasis added)

[20] I have taken into account each of these factors, and in particular those underlined above, in assessing the facts in this matter and in formulating the relief.

Factual Background

[21] The current parent contact and residency arrangements are set out in the 2018 agreement. The clauses relevant to the current proceedings may be summarised as follows: both parties have full parental responsibilities and rights in respect of DS, as contemplated in section 18 of the Children's Act; DS's residency is shared between the parties on the basis that she stays with her parents on alternate weeks, spending Thursday evening (from after school until Friday morning) with the other parent; transfers between households occur at the school premises and each parent is obliged to have sufficient clothing, accessories, toys etc so that DS has all necessary items with her at each home; clauses 4.6 -4.18 address additional obligations on each parent in relation to identified circumstances such as medical issues, religious issues, birthdays etc.

[22] Clause 4.20 records the following express obligations. All of these obligations bear equal importance and the agreement requires each party to actively work on complying with each one.

> "In regard to all the above the parents agree to the following:
>
> • They both understand and accept that the minor child needs and deserves the positive input of both her parents and that this is the minor child's right under the Constitution of South Africa;
>
> • They promise unreservedly that they will unconditionally attempt to put the minor child's best interests before their own and in doing that love and support her;
>
> • They will both have parenting rights, which they should agree to mutually respect and uphold;
>
> • They should understand that the court has the ultimate jurisdiction to modify any arrangements that concern the minor child's wellbeing but that, notwithstanding this, they express their desire not to resort to the court (except in instances where the above mentioned process has failed as certified by the parenting coordinator) with the result that the minor's best interests may be further compromised;
>
> • They should agree to foster love and respect between the minor child and the other parent;
>
> • Neither will do anything that may alienate the minor child from the other parent or negatively influence her continuing relationship with the other parent;
>
> • They should agree to respect the other's parenting responsibility and authority and agree not to interfere with that parent's decisions when the minor child is with the other parent;
>
> • In the event that there is a concern that the minor child's best interests may be compromised, the parenting coordinator should be used immediately to deal with their concern;
>
> • They agree not to make arrangements that would impinge upon the other parent's authority or times with the minor child."
>
> (emphasis added)

[23] Clause 5 deals with maintenance (which is not an issue before me) and clause 6 deals with the appointment of a parenting coordinator. In the 2018 agreement, the parties appointed Dr. Martin Strous as parenting coordinator and described the ambit of his responsibilities which included to "*function as a mediator and manager and as a monitor regarding any potential dispute that may arise between the parties or any occurrence of unhealthy parenting*". The cost of the parenting coordinator was to be paid by the party who approached and instructed the parenting coordinator. The parenting coordinator was not required, in terms of the agreement, to prepare any report and, because he was briefed only to resolve disputes when they arose, was not given a role in positively advising on how to implement the provisions of clause 4.

[24] The current application is brought on the basis, according to the applicant, that the mediation process had failed (FA para 57). This was confirmed by Mr Kruger, who appeared for the applicant, in the submissions before me.

[25] In the view I take of the matter, it seems that neither party has taken into account the full ambit of his/her obligations under clause 4.20 and the ultimate aim of the shared residency arrangement to which he/she agreed. The facts reveal that both parties have focussed on perceived breaches of these provisions by the other but given little more than lip service to his/her own obligations. As an example that the parties do not seem to have given careful consideration to these provisions, I note that the applicant did not obtain any certification from Dr Strous that mediation had failed, before resorting to Court for the application or the counter-application.

[26] Having regard to the financial and emotional costs involved in litigation, and the fact that these resources (both financial and emotional) could be far better employed in the interests of the child, I find it inappropriate to deal only with the relief presented by the parties' legal representatives.

[27] Until such time as this Court is satisfied that both parties have taken the time to fully understand their obligations, accepted the importance of these obligations in working together in DS's best interests and made a concerted attempt to

discharge those obligations, I find it is premature to initiate any procedure setting up further litigation regarding the contact and residency arrangements for their daughter. The analysis set out below is conducted with an eye on the ultimate relief which the applicant seeks, not for purposes of determining that relief, but rather for purposes of determining whether it is in the best interests of the child for this Court to grant Part A and thereby initiate the invasive investigation proposed and commence the litigious process contemplated in the Part B relief.

Complaints by the applicant

[28] The applicant attached to the founding affidavit (marked FA4 - FA8), a series of notes which he had kept from his engagements with the mediator, Dr Strous, from October 2019 to May 2020. The notes record the applicant's various complaints regarding DS's experience when in the care of the respondent and, thereafter, presents as a list of "contraventions" of individual undertakings allegedly given by the respondent during meetings with Dr. Strous. Various of these complaints are then highlighted and/or repeated in the founding affidavit. In my view, these complaints can be addressed in the following categories: i) complaints regarding the respondent's boyfriends; ii) complaints regarding the respondent's household; iii) complaints regarding the respondent's treatment of DS and himself.

<u>Complaints regarding respondent's boyfriends</u>

[29] In paragraph 21 of the founding affidavit, the applicant sets out all of the individuals with whom he alleges the respondent has had a relationship since the divorce. Many of these pre-date the 2018 agreement and appear to have been included to elicit some form of moral judgment against the respondent. This Court makes no such judgment.

[30] The one serious allegation made by the applicant, recorded in paragraph 22, 29 and 42, is the allegation that DS shares a bed with the respondent and her boyfriends. I deal briefly with the two categories of allegation in this regard, namely:

30.1 the arrangements with Mr Nagel, her current partner; and

30.2 the general allegation made.

[31] When Covid-19 level 5 lockdown commenced, the respondent decided to reside temporarily, during the lockdown period, with Mr Nagel. This enabled her to spend time with him and gave her a support structure within his family home which is inhabited by Mr Nagel's parents and his daughters from a previous marriage, who are about the same age as DS. The imposition of lockdown conditions during Covid-19 placed significant strains on many people in South Africa and I find no fault in the respondent's decision to mitigate the effects of the hard lockdown conditions on herself and DS in this manner. To make such a move permanent, the respondent recognises that the consent of the Court is required.

[32] In her affidavit (para 22), the respondent explains the sleeping arrangements at Mr Nagel's house and the presence of two double beds in the main bedroom. The respondent confirms that she is in the process of encouraging DS to sleep in her own room but when she does sleep in the room with the respondent and Mr Nagel, she sleeps in the second double bed, and is often accompanied by Mr Nagel's youngest daughter (who is 6 years old). I note that the respondent's affidavit is supported by a confirmatory affidavit by Mr Nagel.

[33] The fact that a child wants to be close to her parent at night is not unusual. It appears that DS is not quite ready to sleep on her own and that, when she stays at her father's house, he sleeps with DS (in DSs room) and not with his wife. (AA para 22.2) From the answering affidavit, it appears to me that the respondent is protective of her daughter, is aware of the risks that may be associated with the presence of other men in her life and that she takes steps to ensure DS is safe. The applicant's attempt to suggest impropriety or irresponsibility appear to me to be unjustified.

[34] In relation to the loose allegation in paragraph 29 that "*DS even sleeps with the respondent in a bed shared by whoever is the respondent's current boyfriend*",

the applicant provides no supporting detail and in fact contradicts that statement in his earlier allegations regarding C Kruger (FA para 22). The applicant's own statement in paragraph 22 makes it clear that when Mr Kruger was visiting, the respondent and DS were sleeping in the main bedroom and Mr Kruger was sleeping in the spare bedroom. The accusation was that the respondent had left DS to join Mr Kruger in the spare room. This is consistent with the applicant's allegations in paragraph 22 of her affidavit and suggests that the allegation in paragraph 29 was not made responsibly.

Complaints about the respondent's household

[35] It appears to me that this category of complaints is the driving force of the current application. I quote from or paraphrase passages in the founding affidavit and replying affidavit to record the nature of the complaints that fall into this category.

> 35.1 FA para 25 - "I have provided the respondent with a car booster seat to be used when she transports DS. The respondent, however, seldom uses the car booster seat. Her usual response when I talk to her about this is that there is no law compelling DS to be restrained in a car booster seat. This is a clear indication that the Respondent has little if any concern for DS's safety."
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> 35.2 FA para 26 - "I have frequently spoken to the respondent about the fact that DS, whilst she is in the care of the respondent, does not eat healthy balanced meals. At my home DS eats a healthy breakfast and drinks the vitamins which we provide her. The respondent however fails to do so and adopts a hostile attitude when I talk to her about it."
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> 35.3 FA para 27 - On 24 October, 11 November and 20 November 2019, DS did not go to school. The reasons given were, respectively, DS did not sleep well the previous evening, her arm was allegedly sore; her tummy was allegedly sore. When I phoned and spoke to DS on these days, I established that DS was running around playing.

35.4 FA para 28 - “While at my home, DS is taught to follow a fixed routine and to adhere to the boundaries which my wife and I set for her. However, when she is with the respondent, there is no routine or any structured discipline.”

35.5 FA para 31 - “When I communicate with the respondent about establishing a consistent parenting regime, I am met with considerable resistance on the part of the respondent who does not understand that I am trying to create an environment where DS can have stability. The respondent has during the last 6 ½ years failed to establish a balanced and structured environment within which DS can flourish.”

35.6 FA para 32 - “When I try to address the necessary issues concerning DS, I am accused of harassment. The respondent refuses to cooperate with me towards a positive outcome for DS’s sake.”

35.7 FA para 33 - “I try to set the best example as a parent to DS whilst she is in my care by
always trying to lead by example.”

35.8 FA para 39 - The applicant relates the respondent’s decision to move in with Nagel during the Covid-19 hard lockdown. He says “I objected to DS travelling to Gauteng. The respondent however would not listen to reason and in the end, I was forced to agree to DS being moved to Krugersdorp. I said to the respondent that if she wants to care for DS, she should do so at her home at Hartbeespoort.”

35.9 FA para 52 - “One Sunday evening, at approximately 20h00 I made a video call and spoke to DS. I then realised that DS was not at home and in bed as she should be but that she was with the respondent at the Fisherman’s Deck. I have established that DS sometimes goes to bed during the weekday as late as 21h00 or later. In contrast, when DS is with me DS goes to bed at 20h00.”

35.10 RA para 103 - “I deny being controlling and prescriptive towards the respondent. However, I have a huge problem when the respondent neglects and/or fails in her parental duty to ensure that DS daily baths before she goes to bed, brushes her teeth, gets enough sleep, administers medication to DS when she is sick, sends DS to school without breakfast and prepares sandwiches with old moulded bread…. On one occasion the respondent prepared a sandwich for DS to take with her to school. At school DS discovered that the mould on it. DS was very upset about this because she did not have any food to eat for lunch and because her friends teased her.”

Complaints about the respondent’s treatment of DS and him

[36] The applicant makes various allegations regarding the manner in which the respondent communicates and treats DS and himself. Again, I refer to individual paragraphs in the founding and replying affidavits.

36.1 FA 23 - “On a number of occasions, I caught DS lying to me about things that happened at the respondent’s home.”

36.2 FA 56 - “Unfortunately, I have learned that the respondent is a high conflict individual. She often tells DS that she lies and sends DS to the bathroom as a form of punishment. As a result, DS has become reluctant to share her experiences at the respondent’s home with me. The respondent’s usual answer is that DS lies.”

36.3 FA 32 - The applicant asserts that when he tries to address necessary issues concerning DS, he is accused of harassment. He asserts that the respondent has refused to cooperate with him “towards a positive outcome for DS’s sake”.

36.4 FA 54 - “It often happens, on those occasions when the respondent and I see face to face in DS’s presence, that the respondent would scream

at me and curse me in DS's presence." He then relates DS having once told him that the respondent had said to her "*ek hoop iemand ry jou pa van die pad af en dat sy ogies toemaak vir altyd".* He says he confronted the Respondent, who denied having said so.

36.5 In relation to the treatment of DS, the applicant appears to rely on statements made to him by DS. He asserts that on at least one occasion, the respondent had slapped DS through her face. On another, he relates having collected DS from school one Monday when she told him that her heart was sore because "*mama floek en skreeu op my*". At FA 55, he repeats that DS had told him that the respondent screams and swears at her.

The applicant's answer and her complaints

[37] In the answering affidavit, the respondent confirms that the applicant is a good father and has a good relationship with DS. She however expresses significant unhappiness at what she asserts to be (at AA para 16.4) "*the applicant's uncompromising personality and his hostile attitude towards me"*. She asserts that this places "*a further unnecessary emotional burden on [DS] and will not enable [DS] to maintain a healthy relationship with both her parents*."

[38] Not only is the respondent is frustrated by the applicant's criticism of her, but she also complains of the applicant constantly questioning DS about what happens at her house and at what she asserts to be the applicant's use of DS as a messenger between them. In this context, the respondent also complains that the applicant's approach is one which involves a constant comparison, in which he sets out to show that he is the "superior parent".

[39] The respondent points out that DS's absence from school in late 2019 was during her grade R year and before she started formal school. She notes that DS has never been late or absent from school in her Grade 1 year (2020). In AA para 27.3, with reference to attendance at school, she provides an example of events which take place during her week of caring for DS –

> "The applicant is excessively controlling and phoned DS's school various mornings to ensure that DS was at school and that she was on time. This behaviour of the applicant is unacceptable and the applicant simply refuses to accept that I have a right as guardian of DS to independently and without the consent of the applicant, make decisions arising from such guardianship."

[40] In the replying affidavit, the applicant does not deny phoning the school to check up on the conduct of the respondent. His reply records:

> "I deny that I am excessively controlling. I am however a concerned parent and the fact that the respondent keeps DS out of school for no reason is not acceptable, not just for me, but for the school as well.
> 107. In any event, the respondent seems to think that she is the sole guardian of DS. She is wrong."

[41] The respondent has pleaded a bald denial of the applicant's allegation that she has screamed at him and cursed him in DS's presence. She also denies having made negative statements in relation to the applicant while in the presence of DS.

[42] What appears probable to me, from a holistic reading of all of the affidavits, is that the respondent's attitude and her conduct has been negatively affected by what she perceives to be unjustified interference and commentary by the applicant on her household and the manner in which she discharges her parenting obligations.

Analysis

[43] The parties and the Court determined in 2018 that the most appropriate arrangement for DS's contact and residency would be for her to spend alternate weeks with her parents. As noted above, this because the applicant said that he "*felt that DS should spend an equal amount of time with the respondent and*

me" and the parties agreed to the obligations set out in clause 4.20 of the 2018 agreement.

[44] None of the complaints recorded in the affidavits indicate to me that there is any special circumstance which warrants the Court revisiting its previous order as set out in the 2018 agreement. The facts set out above indicate however that the parties are not complying with that order:

> 44.1 The applicant's conduct in criticising the manner in which arrangements are made within the respondent's household and in the manner in which the respondent engages with DS indicates that he has not respected or upheld the respondent's parenting rights, he has not fostered love and respect between DS and her mother; he has, particularly by engaging DS on what happens at her mother's house, acted in a way that could alienate DS from her mother and negatively influence her continuing relationship with her mother. His conduct also shows a lack of respect for the respondent's parenting responsibility and authority and shows that he has interfered with the respondent's decisions when DS is with her.
>
> 44.2 Similarly, the defendant's conduct in failing to ensure that he has telephonic access to DS shows that she has not respected or upheld the applicant's parenting rights. By expressing her frustrations and anger, her conduct undermines rather than foster the love and respect between DS and her father and could also negatively influence DS's continuing relationship with her father.

[45] By breaching these obligations, even if it is done in the name of putting DS's interests first, the conduct of both parties actually undermines DS's best interests. Further, by expressing their frustrations or criticisms of the other (or the way in which their respective households operate), they are in fact putting their own interests and preferences above those of DS and abandoning the solution which they and Court considered best for the child, only three years ago.

[46] It is undisputed that DS finds love and security in both households, that both parents can provide for her needs, that the location of the two households are close enough together to limit disruption, and both provide an acceptable home for DS. If the current situation cannot be solved and the shared residency arrangements must terminate because it appears that one or the other of the parties refuses to comply with his/her obligations under the 2018 agreement, the person that will lose the most will be DS.

[47] Having said all of this, I am firmly of the view that the complaints set out in the affidavits are not of a nature that the Court to embark on a litigious process to change the current living arrangements. There is doubtless no such being as a "perfect parent" (P v P 2007 (5) SA 94 (SCA) at [24]) and I believe that, in this matter, the conduct of the one party sets off the conduct of the other (and vice versa). If the parties are able to find an alternate way to communicate and show the mutual respect which they have undertaken to show, the current arrangement will not need to be changed.

[48] So, before embarking on an exercise to find *'the least detrimental available alternative for safeguarding the child's growth and development*' (P v P *supra* at [24]), it is necessary to ensure both parties have understood the full extent of their obligations under the current arrangement and give them a supervised opportunity to comply with those obligations. This will require for both parents to take a step back, recognise the role of the other in DS's life, consider how they can adapt their engagements with DS and one another to reduce the criticism and acrimony, consider a new approach to the way they communicate with one another and to compromise in a manner that allows DS to receive the benefit of what was intended when the parties committed to the provisions of clause 4.20.

Parent coordinator

[49] In the 2018 agreement, Dr. Strous was appointed only to engage with the parties when there was a complaint which was referred to him as mediator. As a result, Dr Strous was not really a coordinator or involved in facilitating a workable framework but rather a dispute resolution practitioner. The role of a dispute

resolution practitioner is significantly different to that of a counsellor and co-ordinator. Further, the attitude of the parties to dispute resolution process invariably involves each party taking a position to protect his/her rights rather than engaging constructively to accommodate each other's interests (and those of the child). In my view, an active engagement with a parenting co-ordinator, who provides guidance and recommendations is required.

[50] At the end of the hearing, I asked the parties representatives *inter alia* to consider and agree the identity of the parenting co-ordinator. The identity of the parenting co-ordinator has been agreed as Dr Lynette Roux. If Dr Roux is unavailable, her substitute should be a suitably qualified professional as recommended by the Office of the Family Advocate.

[51] In the arrangements during the period until 15 July 2021, I expect the parent coordinator to play a far more proactive and constructive role in dealing with the current *impasse*. For purposes of this ruling, the parenting coordinator will be responsible to do the following:

> 51.1 To meet with the applicant and the respondent at least once every two weeks. Whether the parenting coordinator meets with them together or apart is solely within the discretion of the coordinator.
>
> 51.2 To recommend therapy for DS, if indicated, to identify the appropriate therapist and to have contact with this therapist to obtain any information which the parent coordinator may consider appropriate.
>
> 51.3 To guide the parents and to give recommendations to each of them as to how they can best comply with their obligations in terms of clause 4.20 of the 2018 settlement agreement. In providing such guidance, the parent co-ordinator may recommend that direct contact between the applicant and respondent be restricted during the period of the engagement. All recommendations should be recorded in writing to the parent concerned but need not be copied to any other party.

51.4 To prepare a report for this Court by 15 July 2021 in which the following should be reported on -

51.4.1 the meetings held;
51.4.2 the guidance and recommendations given to each party;
51.4.3 the extent to which each party appeared committed to the process and their obligations as participants in the process;
51.4.4 any noncompliance by either party with their obligations in terms of clause 4.20 or the guidance and recommendations given by the coordinator;
51.4.5 recommendations to the Court on whether, in the opinion of the coordinator, the 2018 agreement should be varied.

51.5 Such recommendations may be in relation to the contact and residency arrangements, the provisions of clause 4.20 or otherwise.

[52] I have purposefully refrained from making any order regarding the treatment of DS or placed any obligation on the parenting co-ordinator to interrogate the conditions in which DS is living, etc. The focus of this order is on her parents, and their commitment to and ability to comply with the terms of the 2018 settlement agreement, terms that have already been confirmed to be in DS's best interests.

[53] If the application were to proceed and deliver a result that DS is required to make her primary residence with her mother or her father, the other parent will remain a significant presence in her life and there will be many times when they will have to make decisions that affect DS. As she gets older, the issues affecting her will become more complex and DS herself will become a far more influential figure in making those decisions. (McCall v McCall 1994 (3) SA 201 (C) at 207) If the necessary communication framework is not established now, with the help of a professional co-ordinator, the challenges ahead will become so much more difficult to navigate for DS.

[54] I have made arrangements with the Acting Deputy Judge President and received permission to act as case manager in this matter, at least until the report of

the parent coordinator has been received and the next steps have been ascertained. I intend to convene a case management meeting soon after the report of the parenting co-ordinator is published and to give directions then on the manner in which the matter is to proceed.

[55] At the same time that the report of the parent co-ordinator is delivered, the parties are required to submit, via the Family Advocate's office, the following information:

> 55.1 The costs paid to the parent coordinator and any therapist for DS recommended by the parent coordinator.
>
> 55.2 The costs paid to Dr. Strous.
>
> 55.3 The legal costs incurred by each party between May 2020 and the case management meeting.
>
> 55.4 A quotation from Prof. Gertie Pretorius of the costs that would be incurred in conducting an assessment to determine the best interests of DS and to prepare a report containing her findings and recommendations (as contemplated in the relief sought by the applicant).
>
> 55.5 The estimate by each set of attorneys of the costs likely to be incurred in contested application proceedings if further affidavits are to be filed and part B of the application is to be heard and determined, including any appeal. Such costs are to be broken down to distinguish attorneys' fees, counsel fees and other costs.

[56] This data is relevant to decisions made by the parties and by the Court, to ensure that resources that could be best employed to benefit DS are not squandered to her detriment in unnecessary proceedings.

[57] In the circumstances, I make the following order:

57.1 The application of the relief claimed in Part A is postponed *sine die.*

57.2 Dr Lynette Roux is appointed as the parenting co-ordinator. If Dr Roux is unavailable, her substitute should be a suitably qualified professional, as recommended by the Office of the Family Advocate, willing to perform the obligations set out below.

57.3 As soon as practicable after the date of this judgment and until 30 June 2021, the parent coordinator is to be provided with a copy of this judgment and to do the following:

57.3.1 Where possible, to schedule appointments and meet with the applicant and the respondent at least once every two weeks. Whether the parenting coordinator meets with the parties together or apart is solely within the discretion of the coordinator.

57.3.2 To recommend therapy for DS, if the parent co-ordinator considers it advisable, to choose the therapist and to have contact with this therapist to obtain any information which the parent coordinator may consider appropriate for the preparation of her report.

57.3.3 To guide the applicant and defendant and to give recommendations to each of them as to how they can best comply with their obligations in terms of clause 4.20 of the 2018 settlement agreement.

57.3.4 To prepare a report for this Court, to be provided to the Family Advocate by 15 July 2021 and copied to the parties, in which the following should be reported on -

(a) the dates on which meetings with the applicant and respondent were held;

(b) the guidance and recommendations given to each party;

(c) the extent to which each party appeared committed to the process and their obligations;

(d) any noncompliance by either party with their obligations in terms of this order or in terms of clause 4.20 of the 2018

settlement agreement or the guidance and recommendations given by the coordinator;

(e) recommendations to the Court on whether, in the opinion of the coordinator, the 2018 agreement should be varied, in relation to the contact and residency arrangements, the provisions of clause 4.20 or otherwise.

57.4 The applicant and the respondent are to schedule and make the appointments arranged with the parent co-ordinator and to pay, in equal shares, all fees due to the parent co-ordinator and to any therapist treating DS.

57.5 By 15 July 2021, the parties are required to lodge a document with the Family Advocate, with a copy to the other side, recording the following information:

57.5.1 The costs paid to the parent coordinator and any therapist for DS recommended by the parent coordinator.

57.5.2 The costs paid to Dr Strous.

57.5.3 The legal costs incurred by each party between May 2020 and 15 July 2021.

57.5.4 A quotation from Prof. Gertie Pretorius of the costs that would be incurred in conducting an assessment to determine the best interests of DS and to prepare a report containing her findings and recommendations (as contemplated in the relief sought by the applicant).

57.5.5 The estimate by each set of attorneys of the costs likely to be incurred in contested application proceedings if further affidavits are to be filed and part B of the application is to be heard and determined, including any appeal. Such costs are to be broken down to distinguish attorney fees, counsel fees and other costs.

57.6 The parties are to make themselves available for an online case management meeting, after hours during the week of 19 July 2021, the

precise date and time will be determined in correspondence with my registrar.

57.7 The costs incurred to date in the current application are reserved and liability for these costs are to be considered if the matter proceeds after July 2021.

DA TURNER
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 8 March 2021
Date of judgment: 7 April 2021

Appearances:
On behalf of the applicant Adv MA Kruger
Instructed by Scholtz Attorneys c/o Mark-Anthony Beyl Attorneys

On behalf of the respondent Adv K Fitzroy
Instructed by Couzyn Hertzog & Horak, Pretoria