IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 3584/2018
DATE HEARD: 13/12/2018
DATE DELIVERED: 18/12/2018

In the matter between

H H	**APPLICANT**
(biological father)	
and	
L M A	**RESPONDENT**
(biological mother)	

In re minor children:

M H

CH

AH

JUDGMENT

ROBERSON J:-

[1] The applicant and the respondent in this matter are the biological parents of three daughters: M aged 16 years; C aged 12 years; and A aged 11 years. The parties were divorced on 4 October 2013 and a settlement agreement was made an order of court. With regard to the children, the settlement agreement provided that the parties would remain co-holders of parental rights and responsibilities, would remain co-guardians, and the children would primarily reside with the respondent, subject to the applicant's rights of reasonable contact. Contact was specified in the

agreement, and included alternate weekends, half of school holidays, father's day, and telephonic and skype access. The agreement also provided that the parties would make joint decisions regarding certain matters, including enrolment of the children in schools and medical treatment. In the event of a dispute about any matter requiring joint decision making, the agreement provided for the appointment of a facilitator who would assist the parties in implementing terms of contact, if necessary in consultation with a mental health specialist or therapist.

[2] Both parties have remarried. The applicant resides in Johannesburg and the respondent, her husband, and the children, reside in Bedford.

[3] It is common cause that the current relationship between the applicant and his children is very poor, to the extent that the children have expressed the wish not to have contact with him, now or in the long term.

[4] The applicant launched this application on an urgent basis, and seeks an order that his contact with the children be immediately restored and that the children should spend the whole of the December holiday with him, that is from 15 December 2018 to 13 January 2019, to the exclusion of the respondent and her husband, such exclusion to include telephonic contact with the children. Further relief claimed is that prior to the children's return to Bedford, they should be assessed by the appointed facilitator, Dr Lynette Roux, alternatively by a qualified expert; that the children, during their stay with the applicant, should be assisted by the facilitator/expert in the contact with their father; that the parties submit themselves for psychological assessment for the purpose of investigating the issue of primary care and residence; that the children be submitted to psychological/therapeutic assessment for the same purpose; and that the respondent be prevented from enrolling any of the children in any school without first consulting the applicant.

[5] The respondent brought a counter-application for the following relief: that the application be dismissed for lack of urgency and for not being in the best interests of the children; that a legal representative be appointed for the children in these proceedings; that the Family Advocate be directed to investigate and prepare a report for the court concerning the bests interest of the children in relation to access and contact with the applicant; that the Family Advocate be directed to appoint Dr Estelle De Witt to conduct the necessary assessment of the parties and the children; that the applicant pay Dr De Witt's fees; and that the respondent be authorised to enrol C and A in the Bedford Country School for the 2018 academic year (M is home-schooled). I must immediately say that in his answering/replying affidavit the applicant agreed to the appointment of the Family Advocate and Dr De Witt, and to the appointment of an independent legal representative for the children.

[6] Both applications had a part B with a view to a return to court following the receipt of the respective reports.

[7] Prior to the hearing of this matter I requested the Eastern Cape Society of Advocates to assist with representation for the children. Advocate Nicola Molony duly represented the children. I am grateful to her and to the Society for their assistance at such short notice, and to Ms Molony for her impartial, comprehensive and helpful contribution to these proceedings. Ms Molony has further agreed to remain as representative of the children in the further conduct of these proceedings.

[8] It seems that after the divorce the relationship between the applicant and the children was happy and healthy but during 2016 the relationship began to deteriorate. The parties attribute different causes to this deterioration. The applicant says it began when the respondent requested an increase in the maintenance for the children. The children started to withdraw emotionally and became distant. The

applicant is of the view that the respondent and her husband have deliberately alienated the children from him and that he has been side-lined in regard to decision making, in particular the children's education. He recounted numerous instances from May 2016 onwards illustrating the breakdown in his relationship with the children and the strained atmosphere when there has been contact following their last visit to him in January 2017.

[9] In December 2016 M emailed the applicant saying, *inter alia*, "Sometimes I feel I do not understand you. You sometimes say and do hurtful things that I don't think an adult should do. It is confusing." In March 2017 M telephoned him and said that their relationship was bad and that they needed mediation. When the applicant telephoned a few days later the respondent's husband told him that the children did not want to speak to him and thereafter sent him a text message saying that access to the children would be stopped until they all underwent mediation. In September 2017 C wrote a letter to him telling him she did not want to see him on that particular day and that she did not want to see him again. This letter was handed to the applicant's wife by a crying C when the applicant and his wife arrived at the respondent's home to collect the children.

[10] Dr Roux was appointed in May 2017 and consulted with the parties and the children. Dr Roux issued various directives for a phased-in resumption of contact between the applicant and the children. She also issued directives concerning parental guidance for the parents and therapy for the children. Telephonic contact was restored but was not successful. If the applicant was able to speak to the children, the communication was difficult. According to one of Dr Roux's reports, following further consultations in July 2017, "rules of engagement" were agreed upon between the children and the applicant. These allowed for telephonic contact on

Wednesdays and Sundays initiated by the applicant, or at any time initiated by the children. During such calls, they were allowed to say "I love you" but were not obliged to say so. They were not allowed to discuss problems in their relationship and the applicant was not allowed to discuss the respondent with the children. The children agreed to participate in visitation contact with the applicant but did not want such contact to include sleepovers. In this report Dr Roux disclosed that therapists had been appointed for the respondent and the children, and that the respondent had reported that the children believed that the therapists understood them and that they were being "heard".

[11] In Dr Roux's final report of August 2018 she said that it was evident that the respondent was not supportive of the process of reintegrating the applicant into the children's lives. The respondent told Dr Roux that the children did not feel heard or understood and that she would not force the children to have contact with the applicant. Dr Roux said that the children were firmly of the view that their wishes needed to be respected and that they could not be forced to see their father. Dr Roux said it was concerning that the children expressed themselves in the same manner as that in which the respondent expressed herself in this regard. Dr Roux said she had been informed that the respondent had made unilateral decisions regarding the children's schooling and medical treatment. Dr Roux stated that it was possible that serious intervention with drastic measures was needed in order to rekindle the father/children relationship. Such intervention might involve placing the children in the applicant's primary care alternatively in a neutral venue.

[12] The applicant approached the Children's Court and in August 2018 the presiding officer ordered that the applicant be allowed contact with C and A on certain days in August and September. M said she would run away if forced to have

contact with the applicant. The ordered contact was not successful. Even at the court the children ignored the applicant and when the applicant went to collect C and A at their home A was crying and refusing to leave. On another occasion the applicant collected the children. They refused to speak to him and refused to eat. On yet another occasion the children sat in the car with their heads between their knees, refused to speak to the applicant or his wife, and covered their eyes and ears if the applicant tried to engage with them. The last meaningful contact the applicant had with M was in January 2017.

[13] The respondent said that up until August 2016 there had not been any major problems and that the applicant had regular access to and contact with the children. The respondent learned of an incident in August 2016 when the children had visited the applicant. He had made the children sit on the floor and spoke about their relationship in a manner which made them uncomfortable and they started to cry. He continued in this manner and they felt trapped and afraid. He accused the respondent of complaining that the children were a burden and that she and her husband had begged the applicant to take them away because they could not take care of the children financially. The children said this was not true but the applicant said that it was true. He left and while M was sending a text message to a friend he returned and demanded her phone. When she refused he cornered her and took away the phone and demanded the password so that he could see all the text messages between her and her friend and the respondent.

[14] After the children returned from the December 2016/January 2017 holiday with the applicant, they reported that similar incidents had taken place. M pleaded with the respondent that she not see her father again because of the way he made her feel. After this the children expressed reluctance to have overnight visits or

extended holiday visits to the applicant. As a result the respondent felt the need for the intervention of psychologists. M was seen by a therapist in January and February 2017. The therapist reported that M indicated that she no longer wanted to visit the applicant because she felt emotionally unsafe, that M was able to offer a balanced version of her experiences, and that she was experienced enough to make her own decisions regarding visits with the applicant. The applicant did not consent to therapy for C and A.

[15] The respondent denied that she and her husband had severed contact between the applicant and the children, and maintained that it was the children's wish not to have contact with him. She said she was supportive of a relationship between the applicant and the children but said that their relationship should first be repaired. She referred to the reports of the three therapists who had seen the children. These reports were annexed to her affidavit. I shall refer to aspects of these reports which I consider most relevant to the present dispute.

[16] The therapist who had seven sessions with M during 2017, reported that M showed anger towards the applicant for wanting her to do things his way, for being controlling, and for not listening to her. M did not want contact with the applicant because of, *inter alia*; his controlling behaviour; his possessiveness and anger if she wanted to call her mother; interrogations about matters she could not answer and feeling scared to be with him because nothing was ever good enough for him; and "I live on my nerves when I'm with him and feel like the parent to my sisters. I cannot just be a child". The interrogations would occur when there were no adult witnesses. The therapist was of the view that M was able to express her needs, thoughts and values.

[17] C's therapist reported on a move from C parroting concerns raised by the respondent to C verbalising her feelings and needs. C did not want to have telephonic contact with the applicant. She referred to the applicant's behaviour as "fake", and said that she and her sisters need to pre-empt his reactions to certain situations in order to prevent him from becoming angry or engaging in intense discussions which made her feel trapped and scared. She also said that the applicant would go on and on about certain matters until she felt forced to comply.

[18] A's therapist said that A was able to describe accurately how certain situations made her feel and if she felt uncomfortable she would be able to communicate her emotions in such a way that all parties involved were respected. A was resistant to contact with the applicant, both in person and telephonically but was not overtly distressed at the possibility of re-establishing contact in the future. The therapist recommended that visits in future should be planned well in advance to allow A sufficient time to prepare emotionally and mentally.

[19] The respondent maintained that she had involved the applicant in decisions regarding the children's schooling. She annexed correspondence between herself and the applicant which showed that she did involve him. Up to and including 2017 the children were home schooled. Prior to the 2018 academic year the respondent engaged with the applicant regarding an alternative to home schooling for C and A. At that stage the Bedford Country School only went as far as Grade 5. The respondent wanted to enrol the children at Yellowwoods School which is about 40 kilometres from Bedford. The applicant did not agree and said he would only pay fees for government schools. C and A were enrolled at Yellowoods. During 2018 the applicant suggested that C and A be enrolled at Collegiate School in Port Elizabeth in 2019 because of operational changes at Yellowwoods. The respondent

agreed that C could go to Collegiate but that A was too young to go to boarding school. When the respondent indicated she could only contribute a limited amount to C's boarding fees, the applicant cancelled the enrolment. The respondent suggested that A move to Bedford Country School which is much closer than Yellowwoods. She subsequently learned that Bedford Country School goes up to Grade 7 and that therefore both C and A could be enrolled there. The respondent suggested this option to the applicant but he did not respond. The children were enrolled at Bedford Country School. Subsequently the applicant's attorneys wrote to the respondent's attorney saying that the children should remain at Yellowwoods to avoid disruption. The applicant emailed Bedford Country School and requested that the children be de-registered. The respondent wrote to the applicant pointing out the heavy costs of daily travel to Yellowwoods and that Bedford Country School's fees were less. She asked for his support in enrolling the children at Bedford Country School. The school has indicated that C and A may still be enrolled for 2019.

[20] Ms Molony placed on record that she had met the children for two hours and explained to them what her role was and what the application was about. She found them to be articulate and able to express their views, and the younger two did not parrot their older sister's views. The children do not want to spend a month with their father and do not want to have contact with him in the long term. They feel that they have to make him happy otherwise he will become angry, and after emotionally charged confrontations they feel a failure to conform to his expectations. The applicant would tell them not to tell the respondent about these emotional confrontations. The applicant would ask them what the respondent said about him and would threaten to take the respondent to court. He said negative things about the respondent's husband. If the children behaved in a particular way the applicant

would blame the respondent and her husband. M confirmed the August 2016 incident. The children reported that the applicant behaved differently in front of other people and A described him as a wolf in sheep's clothing.

[21] Ms Molony said that the overwhelming theme that emerged was the children's feeling of a loss of control and disempowerment. The more they pull away from the applicant, the more he persists.

[22] The children reported that Dr Roux had told them that they would suffer brain damage if they did not have contact with their father. They do not trust Dr Roux.

[23] The children have no objection to Yellowwoods School but like the idea of Bedford Country School. It is closer to home and they will have more time for extra-mural activities.

[24] With regard to the counter-application, the children said that they have dealt with so many therapists already, but they accept that there is a process which must happen.

[25] Ms Molony submitted that in the circumstances a proposed month of seclusion with the applicant was ill-advised. No expert has examined the children since the end of 2017. The relief claimed is drastic and would take away the children's control.

[26] I am of the view that the applicant's assertion of deliberate manipulation of the children by the respondent and her husband is not strongly supported by the evidence. He wrongly asserted that the respondent took unilateral decisions concerning the children's education. The correspondence between them or their attorneys demonstrates that she did involve him. The respondent wanted the intervention of psychologists following the August 2016 incident and the revelation of the children's attitude towards their father. Other than that, this is not a blame game.

The best interests of the children are paramount. In this regard the views of the children are to be afforded recognition, although it is accepted that children's views are not always in their best interests. In the present matter the reports of the therapists and the input and views of Ms Molony demonstrate that these three children are capable of expressing independent and, relative to their ages, fairly mature views of what is in their best interests. In the result their views have considerable weight. This is not a case of physical abuse or another kind of maltreatment. It is a complex emotional situation which one hopes can be resolved so that the prior relationship can be restored.

[27] The main point of contention was the applicant's prayer that the children spend the upcoming Christmas holiday with him with the accompanying exclusion of contact with the respondent and her husband. Counsel for the applicant stressed, correctly, the need for children to maintain a healthy relationship with both parents. A number of the authorities to which Counsel referred concerned instances where the custodian parent was responsible in one or other way for the lack of contact and the deterioration of the relationship between the non-custodian parent and the children. It is correct that there are countless instances where parents inexcusably and to the detriment of their children, use their children as weapons in their personal vendettas.

[28] Counsel for the applicant referred to the matter of *Germani v Herf* 1975 (4) SA 887 (AD) where at 899C-G the court dealt with the child's views. It found that the court *a quo* had attached undue importance to the child's intractable attitude towards his father. The court recognised that the attitude of a child ought to be taken into account in appropriate circumstances, especially when the child was nearly an adult. However the child, although appearing older than he was, was still young, immature,

impressionable and unable to decide for himself what was in his best interests. It was stated that the correct judicial approach was that the refusal of a young child to submit to access was not by itself a reason for disobeying a court order for such access.

[29] I have already indicated that in the present matter that the views of the children do carry weight. I also think it is significant that after the divorce in 2013 the relationship between the children and the applicant was apparently unhindered and healthy, until 2016. This is quite a lengthy period. The children are older now and their current views indicate an emotional response to the applicant's behaviour towards them. They are entitled to their responses and to express themselves accordingly. Given their wishes and views, which appear to be independently expressed, they are entitled not to be forced into prolonged contact which they presently do not want.

[30] I am of the view that, although, as I have mentioned, it is hoped that a healthy relationship will be restored, this enforced prolonged contact is not a solution to the current impasse. There has not been meaningful contact between the applicant and M for nearly two years and such contact as there has been between the applicant and C and A, has been unhappy and strained. The proposed contact amounts in my view to a kind of shock treatment which would not be in the best interests of the children. Counsel for the respondent described the proposal as a social experiment, a description which is not far off the mark. In my view there is a strong possibility that such an order would damage the children emotionally to the extent that future efforts to restore the relationship might not be possible.

[31] The counter-application does not propose to maintain the current impasse and close the door to a restored relationship between the applicant and the children.

The respondent maintained that she has always been supportive of the applicant having access to and contact with the children, and wants them to have a loving relationship. I trust she will conduct herself accordingly in the weeks, months and years to come. There will be an ongoing process with the involvement of independent and objective professionals. The parents must co-operate in the best interests of the children. The respondent's husband is not a party to these proceedings but it is hoped that he will play his part.

[32] As far as schooling is concerned, the children have expressed their views about Bedford Country School. Enrolment there will cut down on expenses and time and generally be favourable to the children. It was not suggested that their education there would be inferior.

[33] I have therefore decided to dismiss the application and grant the counter-application. I am not prepared to order the applicant to pay the costs of his application. I cannot say he is not acting in the best interests of the children. Ms Molony very fairly said she understood the desperation of the applicant. This desperation is indeed understandable considering the ever accumulating breakdown of the father/children relationship. Further, to some extent the two applications overlap. The applicant was not ignoring future exploration and remedies. He agreed to the involvement of the Family Advocate and Dr De Witt, and to independent representation for the children. With regard to the fees of Dr De Witt, I think it only fair that the parties should share these costs. However I take into account the respondent's restricted financial means. She is a candidate attorney and earns R4 500.00 a month.

[34] The following order will issue:

[34.1] the main application is dismissed with no order as to costs.

[34.2] the counter-application is granted in the following terms:

[34.2.1] Advocate Nicola Molony is appointed as the legal representative for the minor children to represent them in these proceedings.

[34.2.2] the Family Advocate is directed to investigate, prepare and submit a report to this Court on the best interests of the children relating to the applicant's access to and contact with them.

[34.2.3] the Family Advocate is directed to appoint, through their offices, Dr Estelle De Witt to administer and perform all necessary and appropriate tests and psychological assessments on the applicant, respondent and the children and provide the results of such assessments to the Family Advocate.

[34.2.4] 75% of any costs associated with the appointment of Dr De Witt are to be paid by the applicant and 25% of such costs are to be paid by the respondent.

[34.2.5] the respondent is authorised to enrol C H and A H in the Bedford Country School for the 2019 academic year.

[34.2.6] both parties are permitted to supplement their respective affidavits, if necessary, in terms of the Rules of this Court, upon receipt of the report and recommendations of the Offices of the Family Advocate.

[34.2.7] the costs of the counter-application are reserved for decision at the hearing of the application for the relief set out in part B of the Notice of Motion in the counter-application,

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J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv S Stadler , instructed by Horn du Plessis Attorneys, c/o Wheeldon Rushmere & Cole Incorporated, Grahamstown

For the Respondent: Adv D De la Harpe, instructed by Greyvensteins Incorporated, Port Elizabeth, c/o Huxtable Attorneys, Grahamstown

For the minor children: Adv N Molony, at the request of the Court