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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

Case No.: 23610/2016

29/6/2018

In the matter between:

A J H

Applicant

And

A H

Respondent

In re: The minor children

J H

and

K H

JUDGMENT

Senyatsi AJ

- [1] This is an application in terms of which the Respondent is requesting that the Applicant be directed to pay the Respondent's taxed or agreed costs in case number 23610/2016.
- [2] The Applicant has brought a counter-application to vary the existing parenting plan, a Part B order.
- [3] The parties are divorced and two children were born during their marriage. In terms of the existing parenting plan, the two minor children were to live with the Respondent who currently lives in Cape Town whilst the Applicant lives in Pretoria.
- [4] Whilst the two minor children were visiting the Applicant during March-April 2016 school holidays, the Applicant launched an urgent application out of this Court seeking an order that the children are to reside with him *pendent lite*. The grounds put in by the Applicant are that the children, whilst visiting him for school holidays, expressed a desire that they wanted to live with him.
- [5] The Applicant failed to return the children to Cape Town. The Respondent opposed the application.
- [6] This Court, issued an order on 7 April 2016 in terms of which a member of the Office of the Family Advocate (Pretoria) was requested to investigate as a matter of urgency, in collaboration with the Family Advocate (Cape Town) who was similarly requested to investigate upon and report upon the best interest of the two minor children.
- [7] The Court ordered that the Family Advocate was more specifically required to consider the question as to the primary care of the minor children as well as contact rights of the opposing party and what terms and extent of those rights should be and to finalise and file such report at the first possible convenience with this Court.
- [8] The Court furthermore ordered that Irma Schutte be appointed to assess the minor children and the Applicant and the Respondent, and to specifically consider the best interest of the minor children, their wishes and to report as to the parent better suited to hold primary care over the children as well as consideration of contact rights for the opposing party and the extent to those rights and to file such a report with this Court at her

first possible convenience and provide either party with a copy of that report.

- [9] The costs of Irma Schutte was to be borne by the parties jointly. The parties were also granted leave in due course on receipts of the reports of the Family Advocate as well as Irma Schutte to supplement their papers for the purpose of part B of the application.
- [10] The costs of part A was reserved to be argued in due course.
- [11] No further steps were taken by the Applicant towards finalising part B of the application and that the steps were taken only after receipt of the present costs application from the Respondent.
- [12] The first issue for determination is whether the Respondent is entitled to the costs of part A application. The second issue to be determined is whether the Applicant has made out a case for part B application.
- [13] It is trite that, in custody and access cases, there is no general rule that no order as to costs should be made.¹ In *Bethell v Bland*², Wunsh J expressed himself as follows on this principle:-

"There is no such 'rule' according to the enquiries I have made from many of my colleagues. The position is rather that in custody and access disputes it is frequently, by reason of the circumstances of the case, appropriate not to make an order for costs..."

One should not elevate where Courts have not made orders as to costs to 'rule'. At most, they can be guidelines to the exercise of judicial discretion. In each case, the facts are crucial..."

- [14] It is also settled law that if one of the parties to custody and parenting proceedings adopts a deliberately difficult and obstructive approach throughout the litigation, the Court, in appropriate circumstances, should impose a serious costs order.³
- [15] I now turn to the legal principles relating to custody and parenting rights

¹ See *Kirsch v Kirsch* [1991] 2 All SA 193 (C) at 215

² 1996 (4) SA 472 (W) at 474 A - D and H. I

over the minor children. The law is settled that in custody disputes, that the best interests of the minor children received the highest consideration.⁴

[16] I have been referred to the case of *Germani v Hert*⁵ by Counsel for the Applicant. In that case, the court was concerned with a factual situation where the father was refused access to a child by the mother and this was done in violation of the Court order in terms of which the father was entitled to certain rights of access to his child. The Court in that case held that the child's resistance to see the father had undoubtedly been encouraged by the negative attitude of the mother. The Court found that under those circumstances, it would have been appropriate for the court *a quo* to have awarded custody of the child to the father.

[17] Section 35(1) and (2) of the Children's Act provide as follows:-

"(1) Any person having care or custody of a child who, contrary to an order of any Court or to a parental responsibilities and rights agreement that has taken effect as contemplated in Section 22(4), refuses another person who has access to that child or who holds parental responsibilities and rights in respect of that child in terms of that order or agreement to exercise such access or such responsibilities and rights is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

(2) A person having care or custody of a child where by another person has access to that child or holds parental responsibilities and rights in respect of that child in terms of an order of any Court or a parental responsibilities and rights agreement as contemplated in subsection (1) must upon any change in his or her residential address forthwith notify such other person of such change."

[18] In this case, the Applicant set the legal process in motion after the minor children visited him during school holidays of April 2016. He decided,

³ See *KLVC v SOI & Another* [2015] 1 All SA 532 (SCA)

⁴ See *Kok v Clifton* 1955 (2) SA 326 (W) at 330 C

⁵ 1975 (4) SA 887 (A)

contrary to the existing Court order, not to return the two minor children to the Respondent on the basis that the children stated that they no longer wished to live with the Respondent.

- [19] The legal proceedings, was initiated without an attempt to mediate the existing agreement with the view to amending same.
- [20] The Family Advocate and the report from Irma Schutte have offered insight and assistance to this Court as to what is in the best interest.
- [21] In fact both reports by Irma Schutte (Pretoria) and Family Advocate recommended that both parties are to enjoy parental rights on the two minor children. It is also recommended that the residence of the minor children is to remain with the Respondent.
- [22] Having considered the submissions by both Counsels as well as the report of the Family Advocate, I am satisfied that it is in the interest of the minor children that both parents are to continue to exercise joint parental responsibilities. It is in my view. not in their interest that their residence should be altered from the Respondent to the Applicant.
- [23] The complaint by the Applicant that he was at one time denied a telephone contact by the Respondent with the minor children, is not, in my view, of a persistent nature that warrants the amendment of the residence rights.
- [24] Consequently, I am of the view that the Respondent has made out a case for costs on Part A of the order. Furthermore, having considered the circumstances of this case, I find that the Applicant has not made out a case for the variation order on the residence of the minor children:

Part B of the application must therefore fail.

ORDER

- [25] The following order is made:-
 - (a) The application for Part B of the order is dismissed with costs
 - (b) The Applicant is ordered to pay the taxed costs of Part A application on the party and party scale.

M.L. SENYATSI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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