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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

17112/2021

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

DATE:23.4.2021

In the matter between:

T D M[...]

Applicant

And

I P M[...]

Respondent

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 23 April 2021.

JUDGMENT

STRIJDOM AJ

Introduction

[1] In this matter the applicant seeks an urgent order in the following terms:

PART A

- 1.1 That this Court dispenses with the forms and service provided for in the Uniform Rules of Court and that this matter be heard as one of urgency in terms of the provisions of Rule 6(12)(a) of the Uniform Rules of Court.
- 1.2 That the Respondent, with immediate effect, return S I M[...] to the care of the Applicant.
- 1.3 That Mrs Bronwyn Stollarz, alternatively Dr Lynette Roux, both clinical psychologists be appointed to, on an urgent basis, conduct a forensic assessment of the minor children, AIM and SIM
- 1.4 That the parties continue to exercise their parental responsibilities and rights in the interim, and pending the finalisation of the psychological report, in accordance- with the settlement agreement concluded during September 2018, which was made an order of Court on
- 1.5 6 November 2018. That both the Applicant and the Respondent contribute in equal shares to the costs and fees pertaining to the forensic assessment and subsequent report as referred to in 3 above.
- 1.6 That part B of this application be postponed *sine die* and that

the Applicant be authorised to set this matter down for hearing on the same papers supplemented where necessary and once a report of the clinical psychologist is available.

[2] The Respondent has contested the application and seeks that the application be dismissed with costs.

Urgency

[3] Having considered the submissions made by counsels for the parties, I was of the view that the matter is urgent and that the Applicant will not obtain substantial redress if she had to wait for the normal cause laid down by the rules.

The Issue

[4] The main issue in this matter is whether it would be in the best interest of the children to grant the order in question.

The Salient Facts

[5] The Applicant and the Respondent were married on 7 July 2007 at Gorna Aryahovitsa Bulgaria. The Respondent lived in South Africa since 2002 and the Applicant moved to South Africa during September 2005.

[6] Two children were born of the relationship between the parties, namely:

6.1 AIM, a son, born on [...] (AIM).

6.2 SIM, a daughter, born on [...] (SIM).

[7] The minor children were born in South Africa and are both South African citizens.

[8] During 2017 the Applicant instituted divorce proceedings against the Respondent. They were divorced on 6 November 2018.

[9] A settlement agreement addressing the parental responsibilities and rights of the Respondent was concluded during September 2018 ('the settlement agreement') and was made an order of Court on 6 November 2018.

1

[10] The settlement agreement, *inter alia*, stipulates the following in respect of the Respondent and the parental responsibilities and rights.

10.1 That the parents retain their parental responsibilities and rights in respect of the care and guardianship of the minor children (clauses 3.1 and 5);

10.2 That SIM's primary residence vests with the Applicant, whilst AIM's primary residence vests with the Respondent (clause 3.2);

10.3 That the minor children will spend each weekend, public holidays, and school holidays together and that they shall have such contact with their parents as stipulated in clause 4 of the settlement agreement.

[11] Clauses 4.14 and 4.15 were included in the settlement agreement. In terms of these clauses the parties agreed to:

11.1 '*... respect the wishes of the minor children as far as the contact with the other party is concerned, provided that the minor*

¹ Vide: Annexures "TDM3a" and "TDM3b" Caselines - p 004 - 5 to 6.

children have reached the required state of maturity and that such contact should not unreasonably be enforced against the wishes of the respective child. The parties further agree to rather engage in family therapy and mediation to resolve any issues as far as contact between the minor children and the parents are concerned, if faced with such issues in the future'; and

- 11.2 *'Contact with the minor children shall be exercised in their best interest and shall create the minimum degree of disturbance to the welfare, health, children's routine, education and necessary extramural activities, with both parties mutually undertaking not to unfairly influence, convince, suggest, promote, undermine and/or alienate the minor children's love, care affection for the other party.'*

[12] After the announcement of the National Covid-19 Lock Down, the Applicant on 24 March 2020 proposed to the Respondent that the minor children reside with each of the parties for 1 week at a time. The Respondent agreed to this proposal.²

[13] After the children resumed their schooling the parties carried on with the above arrangement and it was stated by the Applicant that it worked well for themost part.³

[14] During 12 to 19 March 2021, AIM elected to stay with the Respondent and S[...] stayed with the Applicant. On Friday, 19 March 2021, the Applicant dropped SIM off at the Respondent's residence to stay with the Respondent as it was his week with the minor children.⁴

² Vide: Founding Affidavit; Caselines p 003 - 13 para 10.4.

³ Vide: Founding Affidavit; Caselines p 003 - 13 para 10. 5

⁴ Vide: Founding Affidavit; Caselines p 003 - 14 para 12.1.

[15] The applicant stated that she had a good relationship with SIM. During March 2021, SIM wrote a letter to her, thanking her for all she has and telling her how much she loved the Applicant.⁵

[16] The minor children were supposed to come to the Applicant on Friday, 26 March 2021. This did however not transpire and they are still with the Respondent.⁶

[17] During a telephone conversation between the Applicant and SIM on 24 March 2021, SIM asked the Applicant if she could stay with the Respondent for another week. The Applicant enquired from her why she wanted to stay another week. SIM could not give the Applicant an explanation and became upset and emotional, shouted at the Applicant and told her that she did not want to talk to her. The Applicant enquired from AIM what was going on and he told her that SIM does not want to come to her.

[18] The Applicant's attorney on 25 March 2021 sent an email and WhatsApp to the Respondent, however the Respondent did not reply. He later had a telephonic discussion with the Applicant's attorney.⁷

[19] On Monday 29 March 2021, the Applicant sent a WhatsApp message to the Respondent informing him, *inter alia*, that he is acting in breach of their agreement.⁸

[20] A[...] continuously told the Applicant that neither he or S[...] wanted to see or speak to her.⁹

[21] The Applicant stated that Alexander told her that he was scared and

⁵ Vide: Annexure "TDM4"; Caselines p 004 - 22.

⁶ Vide: Founding Affidavit; Caselines p 003 - 16 para 12.3.

⁷ Vide: Founding Affidavit; Caselines p 003 - 17 para 13.1.

⁸ Vide: Founding Affidavit; Caselines p 003 - 21 para 16.2.

⁹ Vide: Founding Affidavit; Caselines p 003 - 21 para 16.3.

intimidated by her. She further stated that there are times when the children are naughty, disrespectful or when they do not listen, and she is necessitated to address their conduct. She stated that the fact that she reprimands them doesnot mean she intimidates or abuse them.¹⁰

[22] The Applicant stated that she does not seek primary residence of Alexander at this stage as she fears that should he be forced to stay with her now that it will cause a complete break in their relationship.¹¹

[23] The Respondent stated in his answering affidavit that Alexander refused to go back to the Applicant because he was assaulted by the Applicant. He further stated that both minor children often complain of the living conditions while in the Applicant's care in so far as they feel that she does not love them, that she spends too much time with her new partner and his child, that she does not spend quality time with them in so far as she is either busy at work and upon her return home late in the evening she starts drinking on her own and does notpay any attention to the minor children.¹²

[24] The Respondent stated that on the 19th March 2021 when S[...] was brought back to him she was very emotional and she was crying. When the Respondent asked her why she is crying she answered that her mother did not love her anymore and that she is afraid of the Applicant.¹³ Since that day S[...] refused to go back to the Applicant.

[25] The Respondent denies that he ever refused to let S[...] go back to the Applicant. He also stated that both minor children have complained previously of the physical and psychological abuse to which they have

¹⁰ Vide: Founding Affidavit; Caselines p 003 - 27 para 19.4.

¹¹ Vide: Founding Affidavit; Caselines p 003 - 34 para 22.2

¹² Vide: Answering Affidavit; Caselines p 011 - 19 para 79.

¹³ Vide: Answering Affidavit; Caselines p 011 - 20 para 83

been subjected by the Applicant.¹⁴

[26] It is the Respondent's submission that there must be a valid reason why both minor children do not want to see the Applicant currently and that it has nothing to do with his influence over them but that their reaction is caused solely by the Applicant's own inappropriate conduct.¹⁵

[27] During the proceedings in this matter I was requested by counsel for the Respondent as agreed upon by counsel for the Applicant that the Court must have a discussion with the minor children in chambers.

[28] I had a short discussion with the minor children separately in the presence of both counsels.

[29] I was informed by A[...] that the relationship with the Applicant is not very good and that he prefers to stay with his father. He informed me that he was not influenced by his father to make that decision. He further informed me that he did not influence S[...] to stay with the Respondent.

[30] I was also informed by S[...] that she wants to stay with the Respondent because she does not want to be separated from her brother. She said that her mother treated her well and that she loves her very much. She further said that her mother loved her boyfriend's daughter more and spends more time playing with the boyfriend's daughter who is apparently [...] years old. She further informed me that she was not influenced by her father or her brother to stay with her father.

¹⁴ Vide: Answering Affidavit; Caselines p 011 - 23 para 102.

¹⁵ Vide: Answering Affidavit; Caselines p 011 - 24 para 108.

[31] It was submitted by counsel for the Applicant that a proper case has been made out to order the Respondent, with immediate effect, to return Skyla to the care of the Applicant and that the parties are to continue to exercise their parental responsibilities and rights, in the interim, and pending the finalisation of the report of Prof G.M Spies (A Social Worker), in accordance with the settlement agreement concluded during September 2018, which was made an order of Court on 6 November 2018.

[32] It was submitted by counsel for the Respondent that it would be in the best interest of the children to stay with the Respondent and that the minor children visit the Applicant every alternative weekend pending the report of Prof G.M Spies.

[33] Both counsels agree that it would be more appropriate to obtain a Social Worker report and not a report of a Clinical Psychologist. It was further agreed upon that a report will be obtained from Prof G.M Spies and that the report will be available by the end of June 2021.

[34] Prof Spies will be appointed on an urgent basis to conduct a forensic assessment of the minor children in order to investigate the best interest of the minor children in so far as it pertains to the minor children's primary residence, the Applicant's and Respondent's parental responsibilities and rights, in respect of the minor children's primary care and guardianship, if and how the Applicant and/or Respondent must exercise specific parental responsibilities and rights in so far as it pertains to the Applicant and/or the Respondent's contact rights and to make recommendations as to what steps must be taken by the Applicant and/or the Respondent, in order to rebuild the bond between the Applicant and the minor children to restore any break in their relationship that might have occurred.

The Best Interest of the Child

[35] It is common cause that S[...]’s primary residence vests with the Applicant whilst A[...]’s primary residence vests with the Respondent.

[36] Section 28(2) of our Constitution provides that:

‘A child’s best interest are of paramount importance in every matter concerning the child.’

[37] In *Van Deijl v Van Deijl*,¹⁶ it was held that:

‘The interest of the minor means the welfare of the minor and the term “welfare” must be taken in its wildest sense to include economic, social and moral and religious considerations, emotional needs and the ties of affection must also be taken into consideration. Emotional needs and the ties of affection must also be taken into account and in the case of older children, their wishes in the matter cannot be ignored.’

[38] Section 7(1) of the Children’s Act lists 14 factors that must be taken into consideration. See also Section 8.

[39] It was stated in *AB and Another v Minister of Social Development*¹⁷ that ‘All of the 14 factors must be considered in totality in each particular child’s unique circumstances.’

[40] Contact is viewed as a right of a child rather than the parent.¹⁸

[41] A Court must attach such weight to each of these factors as it deems fit

¹⁶ 1966 (4) 260 (R) at 261 H.

¹⁷ 2017 (3) SA 570 CC para [195].

¹⁸ *T v M* 1997 (1) SA 54 (A) at 517 I - J.

and, ultimately, reach a conclusion based on a value judgment regarding what is in the child's best interest in the particular case.¹⁹

[42] The Court is determining what is in the best interest of the child. The Court is not adjudicating a dispute between antagonists with conflicting interests in order to resolve their discordance. The Court's concern is for the child.²⁰

[43] In my view S[...] has been deprived of her right to have contact with the Applicant for an extended period. It is in the best interest of S[...] to have a good relationship with her mother and father. Although it is her wish to stay with the father, due consideration was given to her view, having regard to her age, maturity and stage of development. S[...] is now [...] years old and in grade 4.

[44] Having considered the provisions of Section 7 of the Children's Act, I am of the view that it would be in the best interest of S[...] to return to the care of the Applicant and that the parties are to continue to exercise their parental responsibilities and rights, in the interim, and pending the finalisation of the forensic report of Prof G.M Spies (Social Worker) in accordance with the settlement agreement which was made an order of Court on 6 November 2018.

[45] I am also of the view that part B of the application must be postponed *sine die* and that the Applicant be authorised to set down this matter down for hearing on the same papers supplemented where necessary and once a report of the Social Worker, Prof G.M Spies is obtained.

[46] In the result, the draft order marked X is made an order of Court.

¹⁹ *K v M* 2007 (4) All SA 883 (E), *P v P* 2007 (5) SA 94 (SCA).

**STRIJDOM AJ
ACTING JUDGE OF THE
HIGH COURT
GAUTENG DIVISION
PRETORIA**

Date of hearing: 20 April 2021

Date of judgment: 22 April 2021

Appearance:

For the Applicant: Adv H.J Basson

Instructed by: Pennells Attorneys

For the Respondent:

Instructed by: Marina Naydenova Attorneys

²⁰ *McCall v McCall* 1994 (3) SA 201 (CPD).