IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE No: 9086/16

With case no's: 8658/16

and 2179/14

In the matter between:

S Plaintiff

and

S Defendant

JUDGMENT DELIVERED THIS 28TH DAY OF JUNE 2017

PARKER, AJ

INTRODUCTION:

[1] The parties in the first and last of the above three matters (the first being motion proceedings and the last being an action) are the same. In the second matter Craig Schneider is cited as second respondent, whilst the applicant and first respondent are the same parties as in the other two cases, viz Mr S and Mrs S. It is also so that the three matters are so intertwined and, as will become clearer later herein, the one almost invariably arose in reaction to the other.

[2] The parties are in the different matters cited either as plaintiff and defendant or in the other matter(s) as applicant and respondent, respectively depending on the nature of the proceedings.

[3] For reasons of convenience, and not to unduly burden this judgment with cumbersome references to Mr S and/or Mrs S, plaintiff, defendant, respondent and/or applicant when these roles constantly change throughout these different cases, I shall refer to Mr S as the plaintiff and Mrs S as the defendant even though in particular circumstances they may have been cited as either applicant or respondent.

[4] I do not think that it would be unduly dramatic to say that the underlying reasons for this litigation, which commenced in 2014 and still continues, pre-exist the litigation and are to be found in the unstable foundation of the marriage between the plaintiff and defendant.

[5] The principal controversy, and multiplicity of issues to be decided in these matters, arise from the complex relief sought in the different matters. These issues are further underpinned, if not completely bedevilled, by what appears to be an obsessive litigious attitude on the part of the parties, more so the plaintiff than the defendant. The plaintiff seemingly has displayed and continues to display an attitude of “I won’t stop at anything to get what I want even if in the process I have to engage the defendant in litigation endlessly”. The defendant has been constrained to respond to this attitude in litigation of her own in order to prevent what she may

justifiably have perceived as an attempt to unduly interfere with and erode her parental rights by out-litigating her.

[6] I decidedly and very deliberately referred to the obsessive litigious attitude, not lightly but because of the rather of most unpalatable, if not almost toxic, acrimony displayed in all of the papers and even during the trial before me. I shall refer to features of this tasteless tirade of acrimony only to the extent necessary to emphasise a particular point. I am of the view that no gainful purpose will be served, and in fact that it would be counter-productive, to unduly indulge in the vitriol and toxic acrimony between the parties.

[7] The crisp and succinct issues that remain to be decided by me are:

7.1 Whether or not the plaintiff should be visited with a cost order in respect of matter 2179/2014, and if so on what basis;

7.2 Whether or not the facilitator Mr Craig Schneider should be removed;

7.3 Whether or not an alternative facilitator should be appointed and if not, whether mediation and/or arbitration should not instead be ordered;

7.4 Whether or not the relocation of the two children (accompanying the defendant) to Rooi-Els should be condoned and allowed to prevail; and

7.5 The extent and of contact nature that should be allowed between the children and the non-custodial parent.

7.6 Related to this contact issue is the issue of travel arrangements that needs to be put in place to facilitate such contact.

[8] In addition to the above core issues I also have to address certain ancillary issues which are important to the extent that they are related to the state of mind and *modus operandi* of the respective parties and most crucially are necessary in order to address the best interest of the children. I say this because although the one thing about which there seems to be no dispute is the fact that both parents are described by everyone of the multitude of experts as good individual parents, they seem to be completely incapable of co-parenting, certainly in a manner which is in the best interest of the children. There seems to be an unhealthy obsession with wanting to get even with the other parent, more so on the part of the plaintiff, totally disregarding the effect this obsession may have on the children and what may be in their best interest.

BACKGROUND:

[9] The parties were married to each other on 6 August 2006.

[10] The defendant was not able to bear children. The parties concluded a surrogacy agreement resulting in the two girls, (hereinafter referred to as the children), being born through a surrogate mother on 23 April 2010.

[11] The parties got divorced on 12 February 2013. The divorce order incorporated a consent paper to which a parenting plan was annexed incorporating the details of the respective co-parenting rights and responsibilities in respect of the children.

[12] The problems of a very deep rooted and serious nature which plagued the marriage continued to affect the relationship between the parents, in total disregard, of how it affected the children. This situation was exacerbated by the fact that post the divorce the defendant met and commenced a romantic relationship with one Dr Horn. This relationship grew from strength to strength and has endured for approximately 3 years to date thereof and seems to be a very loving, caring and seemingly permanent relationship.

[13] The deterioration in the relationship between the parties reached the point where the plaintiff launched the proceedings under case no: **2179/14** on 10 February 2014, approximately one year after the divorce on (12 February 2013). This was an urgent application in terms of Rule 6(12()(a) of the Court Rules, on very short notice to the defendant. In fact the defendant had only 3 days' notice and was not able to effectively oppose the application. On 14 February 2014, an order was granted in favour of the plaintiff pursuant whereto the children, who had been placed in the defendant's primary care following the divorce, were summarily and without warning removed from the defendant's care and placed in the care of the plaintiff. The primary residence of the minor children was also summarily changed to that of the plaintiff. The Sheriff of the court was authorised and ordered to remove the children from the defendant's care should the latter fail to voluntarily hand over the children to the plaintiff.

[14] Pursuant to the order of 14 February 2014, the defendant was only able to exercise contact with the children subject to supervision. The order also provided for

the appointment of a social worker. The order to the social worker was to conduct an urgent investigation into the serious allegations made by the plaintiff against the defendant, which allegations, *inter alia,* implied the abuse of alcohol on the part of the defendant.

[15] The above order of 14 February 2014 was a *rule nisi* with the return day being 14 April 2014.

[16] The defendant anticipated the return date and filed opposing papers addressing the serious allegations against her, together with a counter-application, pursuant whereto, on 28 February 2014, the same Judge who had granted the *rule nisi* on 14 February 2014, granted an order in terms whereof:

16.1 The children were immediately returned to the primary care of the defendant.

16.2 The office of the family advocate was requested to conduct an urgent investigation into the care and contact arrangements regarding the minor children and the allegations by the plaintiff regarding the defendant's alleged abuse of the minor children. The office of the family advocate was also directed to appoint a suitably qualified and experienced clinical psychologist whose costs were to be borne by the plaintiff.

16.3 One Sandra Hitchcock was re-appointed as a facilitator to the parties and was afforded the liberty to request reasonable and random

drug/alcohol testing of the defendant, with the costs of such tests to be paid by the plaintiff.

16.4 Costs in respect of the main as well as counter-application stood over for later determination.

[17] Various interventions by different experts took place. In addition directives were issued firstly by Sandra Hitchcock and subsequently by her successor Mr Craig Schneider. These directives seemed to change depending on changing circumstances and also interchangeably operated against the respective parties.

[18] On 16 May 2016, the defendant launched motion proceedings against the plaintiff and said Mr Craig Schneider under case no: **8658/16**, in terms whereof she sought relief in two parts.

[19] Pursuant to this application, and on 27 May 2016, an interim order was granted in terms whereof Part A was postponed to 9 June 2016.

[20] Shortly after the motion proceedings under case no: **8658/16**, were served on the plaintiff, and before the aforesaid interim order of 27 May 2016 was granted, the plaintiff issued summons under case no: **9086/16**, on 26 May 2016.

[21] On 9 June 2016 (being the return day of the *rule nisi* of Part A in matter under case no: **8658/16)** this court, combining the two cases (**8658/16** and **9086/16)** granted an order in terms whereof:

21.1 The action under case no: **9086/16** was set down for hearing on 29 November 2016;

21.2 The defendant's claim in Part B of the application under case no: **8685/16** was converted to a counter-claim, in case no: **9086/16**.

[22] On the same day (9 June 2016), the same court (Le Grange J) granted an order in case no: **8658/16** *inter alia*:

22.1 Setting out in detail the plaintiff's right of contact with the children pending the outcome of the action instituted by him under case no: **9086/16**.

22.2 Ordering the plaintiff to ensure that the children are transported between Rooi-Els where they were living with the defendant, and the plaintiff's place of residence.

22.3 Granting the plaintiff the right to choose which one of Messrs' Rob Sandenberg or Larry Lubenstein he engages. The plaintiff was responsible for the payment of the said clinical psychologist.

Mr Rob Sandenberg or Mr Larry Lubenstein, the registered clinical psychologists was authorised to carry out an investigation forthwith and

compile a report encapsulating his findings and recommendations regarding:

22.3.1 What contact and residency arrangements would be in the best interest of the children;

22.3.2 The children's psychological functioning, education progress and general welfare;

22.3.3 Whether it would be in the children's best interests that they reside primarily in Rooi-Els (with the defendant) or whether they should live primarily in the Melkbos area (or Welgemoed) plaintiff's area of residence.

22.4 The issue of cost in the main application, the counter-application and the application under case no: **2179/14** stood over for later determination.

[23] On 29 November 2016, the court (Goliath, DJP) under case no's **9086/16** and **8658/16** ordered that:

23.1 The application under case no: **8658/16** be postponed for hearing to or as if not only Part A the Fourth Division on Monday, 12 December 2016 to determine interim issues that may arise pursuant to the facilitator's directives.

23.2 The action under case no: **9086/16,** together with Part of application under case no: **8658/16** be postponed to Wednesday, 15 March 2017 for trial.

23.3 The plaintiff was ordered to provide a copy of the report of Mr Rob Sandenberg the facilitator by 29 November 2016 who in turn was ordered to disseminate the report to the defendant. Regarding this report by Rob Sandenberg it became necessary for the court to specifically grant an order that the report be made available to the facilitator and also to the defendant because the plaintiff and his attorney refused to make the report available to the defendant, nor was it filed at court. I shall in more detail deal with the profound and very revealing circumstances under which this report was withheld.

[24] These 3 matters were then allocated to me for hearing on 15 March 2017. After initial perusal of the papers I gained a sense that there was a blinkered and obsessive all-consuming drive to indulge in protracted litigation which at that point must have been extremely costly both financially and emotionally (particularly to the children). It was likely to be further exorbitantly costly. The matter had been set down for hearing over 5 days and likely was to last longer if the issues were not significantly narrowed and most importantly if the parties were not imbibed with a measure of sanity. It was apparent that the litigation in these matters were embarked upon often without much or any thought as to what would be in the best interest of the children. I was also gravely concerned about the damaging effects on the most vulnerable and impressionable 6 year old children. Another aspect that occurred to

me was that the big fight between the parties was actually about very limited substantive issues as the relocation had occurred more than a year ago. Apart from the fact that the relocation was a *fait a complet*, the children were seemingly settled in a school environment, I got the distinct impression that the litigation was kept alive and was fanned by an underlying inability on the part of either one or both of the parents to leave the other alone and that issues surrounding the children were used to sustain this litigation.

[25] As a result of my serious concerns above, I called the respective counsel to my chambers and shared these concerns with them. I prevailed upon them to in turn prevail upon their respective clients to come to their senses and exclusively in the interest of their children to resolve their differences amicably and settle these disputes. I was at pains to stress with counsel that my only motivation for doing this was to safeguard further trauma and lasting adverse effects on the children. As a secondary motivation I was concerned about the cost involved in sustaining this litigation, whilst the apparent issues in dispute were clearly insubstantial and patently capable of resolution.

[26] The parties' respective counsel assured me that they had made every attempt to settle the matters but seemed unable to achieve a settlement.

[27] Prior to the commencement of this matter on 15 March 2017, and because I feared that if the trial commenced and momentum was built it would become

increasingly difficult for the parties to reach a settlement, both the plaintiff and defendant, together with their respective counsel appeared before me in court. During this sitting, I again repeated my concerns in the presence and hearing of the parties and actually implored them to set aside their personal issues and differences and to rise above such issues in achieving some resolution in the interest of the children. I informed them that I am obliged, and will not hesitate, to take whatever steps may be necessary, to safeguard the best interest of the children. I was given the assurance that the parties would engage each other through their respective counsel and make a further concerted effort to resolve the issues and try to come to an amicable settlement.

[28] When the parties, together with their counsel, appeared before me prior to 15 March 2017 formally and in open court in an attempt on my part to get them to rise above the petty issues and settle the matter in the best interest of the children, I was handed a facilitator's directive by Mr Craig Schneider the second respondent in case no: **8658/16**. This directive sought to supplement his last directive of 9 December 2016. The facilitator further advised that in arriving at his latest directive he had consulted various experts including most crucially one Janette Bytheway, a clinical psychologist and therapist, who had attended exclusively to the needs of the children. All the experts, including the facilitator, were unanimous that both parents must take responsibility for the on-going conflict, which conflict is clearly not in the best interest of the children.

[29] Attached to the aforesaid directive by the facilitator Craig Schneider dated 13 March 2017, was a report by Janette Bytheway, for the period August 2016 to February 2017. This report was dated 9 March 2017. Reference to the report or its contents will be made further herein. However I am constrained to refer to what Janette Bytheway said in paragraph 9.2 thereof, viz:-

> *"(The children) both indicated clearly that they wish the arguments between their parents to stop. They requested that the examiner communicate this to both their parents."*

The same self-said Janette Bytheway in her report recommends that:

> *"The court investigates how to better protect these children from the relentless litigation and ongoing conflict between the parents."*

[30] Despite the above best efforts and the requests, arising from serious concerns of the experts and the facilitator, the matter was not settled and commenced before me on 15 March 2017 and continued for 7 days (including oral arguments by the respective counsel).

[31] At the commencement of the hearing on 15 March 2017 defendant's counsel handed up to court a document which is titled "*Tender soos op 14 Maart 2017 en verwerp deur eiser op 15 Maart 2017".* This document is part of the record as annexure "NNN".

[32] The sole purpose of outlining the above background and in some way focusing on the attempts made to resolve this matter is purely to highlight the absolute determination arising from an obsession to get even with the other that has fuelled this meaningless litigation in total disregard for the detrimental effect it has on the children.

EVIDENCE/ASSESSMENT:

[33] The only oral evidence at the trial was that of the plaintiff on the one hand whilst for the defendant only Mr Rob Sandenberg testified, the defendant choosing not to do so.

[34] I shall briefly assess the evidence given by the plaintiff, which is rather complicated by the fact that he testified about his involvement in all three separate matters.

[35] Since the only issue under case no: **2179/14** was costs and it was apparent that there was a strong drive to get a cost order against him, he was clearly making every effort, whilst testifying, to avoid such an adverse cost order. In respect of the second matter namely case no: **8658/16** he was clearly trying to be as persuasive as possible hoping that the court would not grant the defendant's application in both parts A and B. In respect of the third matter under case no: **9086/16** he tried very hard to make out a convincing argument for the relief sought by him which essentially required me to make an order that the children effectively relocate from

where they had been living at Rooi-Els for approximately 15 months and reside permanently with him or within a 20km radius of a school in Melkbosstrand, Western Cape. In addition he asked for an order that the visitation, care and contact regime, be specified and ultimately that the defendant pays the cost of this action.

[36] Counsel for the defendant at the end of the evidence argued that the plaintiff was an evasive witness who occasionally laughed while giving evidence as if this whole matter was joke or a game. I did not get the impression that he was laughing or smiling because he thought it was a joke but rather that it was his way of trying to come across as a very reasonable and affable person who is very kind and soft-natured. In this regard I make reference to a report by one of the experts in this matter namely Dr Ilse van der Merwe who evaluated the plaintiff during the period 20 February to 12 March 2017 when she reported that:-

> *"Although Mr S comes across as very soft and overly accommodating he does present with strong traits of a need to be in control of the situation and be informed of anything relating to the case as such. He is a strong minded person and is very focused on the case at hand, possibly to such an extent that it clouds his input towards his daughters in regards to their mother. The conflict between the parents and Mrs S's partner colours decisions and action that need to serve in the children's best interest, a good example would be, when the author assessed the children. On the day of the assessment it was clear that the author will only assess the children and that a parent will bring them and wait for them in the reception room. On that day it became a family affair. Mrs S brought the girls and her mother was present as well as*

Mr S. The tension was palpable and the girls were very tense and very unsettled. Mr S mentioned that he had not seen the children for more than 2 weeks and wanted to spend time with them. In the author's opinion this was not the place not (sic) the time for this. It is already a stressful event to see a stranger and also dealing with the tension of both parents in a room is very unfair and selfish situation to put the children in. A lack of boundaries was evident.

Understandably Mr S wanted to see the children, but this could have been done post-assessment. The need of the parent should not trump what is in the child's best interest."

[37] The plaintiff appeared very alert and not at all naïve and/or uncomfortable on the witness stand. He however often contradicted himself when confronted in cross examination. He was at time unable to answer questions or persisted with answers even when the answers were shown to be ludicrous or at times just simply nonsensical.

[38] Throughout his testimony the plaintiff tried to portray the defendant as an unfit mother who would not care about exposing the children to risks emanating from the living environment with Dr Horn. When he was confronted with the fact that following on his urgent application under case no: **2179/14**, that the defendant had submitted herself to a series of tests intended to disprove his allegation that she abused alcohol and drugs, he insisted that those tests were incomplete and to the extent that

some tests were done the results were not acceptable to him. He had no hesitation in suggesting that the defendant could easily have deceived the court by having her sister go for these blood tests. Similarly when he was confronted with the known after effects of the cancer medication taken by the defendant he was dismissive of such fact suggesting that he was not sure how bad her cancer was and whether the medication had the side effects described by the defendant despite available literature indicating such after effects. He responded to these questions by asking why someone like Dr Horn had not given an official medical certificate confirming the after effects of this medication.

[39] The plaintiff's obsessive nature and focus on the case, possibly to the extent that it clouds his input towards his daughters, was also evidenced when he was confronted about the fact that the children and the defendant had moved to Rooi-Els with Dr Horn, had been living there for approximately 15 months, and had settled in a routine, and most importantly appeared to be happy other than for the destructive tension between their parents.

[40] He simply brushed aside the aspects and insisted that the children must move back close to Melkbosstrand. In addition there is abundant evidence, emanating from the opinions of at least 3 experts as well as the facilitator Mr Craig Schneider that it would be in the best interest of the children if they remain in the primary care and at the residency of the defendant at Rooi-Els. He persisted with evidence in his claim as embodied in case no: **9086/16** namely that the court orders that the children relocate to within 20km from a school in Melkbosstrand. He was totally blind to the

reality that his demand would invariably entail their mother having to move with them which in turn would result in a serious strain on the relationship she has with Dr Horn which has lasted for some years. He persisted with this claim even in the face of serious attempts on the part of the defendant right up to the doorstep of the court, prior to and after the commencement of the trial proceedings. When he was faced with the evidence of Rob Sandenberg, who was an expert he engaged, he revealed the rather unpleasant side to his character by attacking Rob Sandenberg's independence as an expert as well as his expertise.

[41] The plaintiff did not impress me as a credible and reliable witness. I got the impression that in order to advance his agenda, he would not hesitate to unjustifiably and with impunity embellish and even distort facts. He did not hesitate to attack Mr Rob Sandenberg when he did not like, the recommendations because same did not accord with what he wanted.

[42] The only other witness to testify was Mr Rob Sandenberg who impressed me as a very credible and reliable witness. He certainly displayed a high measure of independence and was definitely intent on remaining objective throughout in trying to assist the court to arrive at the best possible decision in the interest of the children. He displayed a laudable measure of integrity and honesty when he readily told the court about the pressure that he was put under not only by the plaintiff but also the plaintiff's attorney to alter his findings. He resisted this pressure despite being told by the plaintiff's attorney that he was, like all other experts, just a hired gun who should

give an opinion in favour of the person who pays his fees (more will be said about this unsavoury aspect of this case later herein).

ISSUES TO BE DECIDED:

(i) Case no: 2179/14

[43] Though cost is the only issue to be decided in this case it would be necessary to highlight some pertinent aspects relating thereto. I was requested by counsel for the plaintiff to have regard to the fact that in matters of this nature involving children the court must keep in mind that whatever order it chooses to make in regards to costs might have a prejudicial impact on the relationship between the parties as they remain the co-parents of the two children and would need to continue to co-parent the children for many years to come. It was further argued that it was very likely that if the court makes an adverse cost order in these proceedings that it would probably only lead to more acrimony and resentment between the parties and in fact it would add the proverbial fuel to the fire. I was further reminded that it would be inappropriate to mulct any particular party with costs in a matter such as this, where the parties are in conflict with each other in seeking the best interest of their minor children. In this regard counsel referred me to the case of *F v F* 2006 (3) SA 42 (SCA) and *JP v JC and another* [2016] 1 All SA 794 (KZD). Ultimately I was asked by counsel for the plaintiff to order that each party pay his or her own costs in respect of all proceedings instituted under case no: 2179/14.

[44] Counsel for the defendant on the other hand argued that I should order the plaintiff to pay the costs of the application as well as the counter-application on a scale as between attorney and own client. In support of this argument, I was prevailed upon to have regard to the fact that if people litigate without having the best interest of the children at heart, and what is more is if such people do not heed the very pleas of their children to stop this litigation and acrimony there is no reason why the court should not show its disapproval at the particular party's conduct by awarding an appropriate cost order against such party. It was further argued that if someone like the plaintiff is not stopped in his tracks and made to realise that the court process cannot be abused in his quest to financially and/or otherwise bully the defendant into submission, he will continue on this destructive litigious path. If on the other hand, it was argued, he was to be forced to be realistic in his approach to these issues by being visited with a cost order, and specifically a punitive cost order, he may come to his senses and in future place the interest of the children above his personal agenda. In any event it was further contended that it would hardly be likely to fuel the fire if an adverse cost order is awarded against the plaintiff. I was also reminded that the plaintiff placed no evidence before the court that he is financially not in a position to afford to pay costs due to any hardship. In fact it would appear as if he has access to funds which has enabled him to sustain this litigation since 2014, and even before that which does not form part of the proceedings before this court.

[45] It is significant to note that according to the plaintiff the defendant had brought an application in terms of the Domestic Violence legislation against the plaintiff allegedly based on his on-going bullying and controlling conduct. This application was apparently launched in December 2013 and was on-going when suddenly in

February 2014 the proceedings under case no: **2179/14** were launched by the plaintiff. Initially in these proceedings the plaintiff did not allege that the defendant is sleeping around with other men in the absence of Dr Horn but did so strategically when faced with the counter-application by the defendant. This was probably the nastiest allegation to level against the defendant when all the others did not gain any traction. The allegation of alcohol and substance abuse also came to naught despite investigations by various persons in this regard. Even the subsequent allegation by the plaintiff that Dr Horn had been exposing his private part/penis to the children was investigated and it was found that there was no evidence or basis for such allegation. In fact according to the experts, who investigated this allegation, the children alleged that they were made to play with the plaintiff's penis.

[46] On the conspectus of all the available evidence it is apparent to me that the proceedings under case no: **2179/14** were launched in reaction to and in the hope of getting his way and unduly pressuring the defendant.

[47] The motivation for having brought this application on an urgent basis, which resulted in the drastic order being obtained on 14 February 2014, was rather unpersuasive and based on what appears to be false allegations against the defendant. The defendant was at very short notice forced to come to court in person to try and defend herself against what she maintained were trumped up and false allegations against her.

[48] It was further uncontested that the defendant had to obtain a loan of R150 000-00 from her mother to be able to file proper opposing papers and a counter-application. Not only did she incur the expense of acquiring legal assistance to prepare the counter-application and argue same, she also put herself through a battery of tests to refute these false allegations against her. There were clearly compelling reasons, under these circumstances for the defendant to anticipate the return date and return to court on an urgent basis 2 weeks after the plaintiff had obtained the *rule nisi*.

[49] The defendant's opposing papers (and counter-application) were persuasive enough and succeeded in having the interim order reversed by the same judge (Henney, J), and in so doing to get the children returned to her custody.

[50] It is clear to me that the plaintiff was motivated by malice and a desire to control the proceedings to get the upper hand when he launched this urgent application. When it was pointed out to him that there did not seem to be a reason to have launched these proceedings on an urgent basis and to have obtained the interim relief seemingly on unfounded vicious allegations against the respondent, he shifted his explanation to one which suggested that he merely did what he was advised by his legal team in deciding to launch these urgent proceedings. When it was pointed out to him that what he was seemingly complaining of was a noncompliance on the part of the defendant with the provisions of the divorce order and in particular the parenting plan and that the correct approach would have been

to approach the court for a contempt order, he reluctantly conceded that that was the case.

[51] This attitude of self-righteousness and wanting to get his own way at all cost, regardless of the effect on the children was persisted with throughout the proceedings, even whilst giving evidence. When the plaintiff arrogated to himself the right to demand that Mr Rob Sandenberg change his report he suggested that he did not know that if he wanted to speak to the expert he needed to do so via his attorney. It is unlikely that he would not have sought his attorney's advice in this regard as he clearly was in regular contact with his attorneys if one has regard to the on-going nature and extent of the litigation. (More will be said about this later herein.)

[52] It is also significant that at the commencement of the trial, he was presented with a tender by the defendant in terms of which he was meant to concede the issue of residency and therefore render the argument about relocation as no longer an issue. He simply rejected the tender even though, as he later conceded under cross-examination, it would be more harmful and naïve to really expect a court to, under these circumstances, order the children to be uprooted from Rooi-Els and to be ordered to relocate and take up permanent residency within a 20km radius from a school in Melkbosstrand.

[53] I have considered the sentiments in the cases quoted by plaintiff's counsel in support of the argument that in matters involving children such as this, courts should

not make cost orders in the hope of preventing further conflict between the parties. I am however of the view that it is not so that there is such a rule of practice or even a strong trend for courts not to make cost orders in such instances. I do endorse the notion that, where possible, a court should try not to visit either party with a cost order in such instances if the court is of the view that by doing so it would enhance the prospects of the parties co-parenting the children more harmoniously in the future.

[54] In this particular case however I am of the view that not making a cost order against the plaintiff and ordering each party to pay his/her own costs would not only be counterproductive but would be unduly harsh on the defendant who was dragged before court in an unnecessary and most stressful manner. She was confronted with rather nasty allegations against her all of which appear to be unfounded. The children were removed from her custody unceremoniously and without any warning and only returned some 2 weeks later also only after the intervention of the court and an appropriate order in that regard.

[55] Should I in this case order the plaintiff to pay the costs of the proceedings under this case number I will be in good company as courts, and in particular the Appellate Division (as it was then called) and now the Supreme Court of Appeal has awarded costs against a litigating party in cases such as these. In this regard I refer to the case of *Shawzin v Laufer* 1968 (4) SA 657 (A); *Du Preez v Du Preez* 1969 (3) SA 529 (D); *P v P* 2007 (5) SA 94 (SCA); *J v J* 2008 (6) SA 30 (C). These are but a

few examples where courts have awarded costs against a litigating party in these kinds of matters.

[56] I have also been asked to make a punitive cost order on an attorney and own client basis. When making an attorney and own client order the court indicates its strong disapproval of the conduct of a party. It also serves to ensure that the party in whose favour such an order is granted is more fully indemnified than an ordinary attorney and client cost order.

[57] In this case I am of the view that a proper case has been made out for a cost order against the plaintiff and accordingly order that the plaintiff pays all the costs occasioned by both the application as well as the counter-application under this case number, which costs shall include the costs of counsel and experts whose services were utilised. In addition the costs of any tests that was done and paid for by the defendant are also to be paid by the plaintiff.

(ii) Case no: 8658/16

[58] The defendant launched an urgent application on 20 May 2016 to have a directive, that was issued by the facilitator Mr Craig Schneider, set aside and to interdict the latter from issuing any further directives pending the determination of Part B of the application (in which the defendant sought amendments to the

parenting plan and the removal of the facilitation clauses). The plaintiff opposed the relief sought and on 2 June 2016 filed his answering affidavit and also launched an urgent counter-application to be heard on 9 June 2016 wherein he requested that the aforementioned directive be made an order of court, to be afforded more contact with the children and that a clinical psychologist, Mr Rob Sandenberg, be appointed to conduct an assessment and to make recommendations pertaining to the relief sought by the plaintiff in action under case no: **9086/16**. The defendant duly opposed the counter-application.

[59] The facilitator Mr Craig Schneider, who was cited as a second respondent in these proceedings filed a notice to abide.

[60] On 8 June 2016, Mr Craig Schneider filed an affidavit wherein he, in broad strokes, denied the allegations made against him by the defendant in her founding affidavit. He declared that if the court deemed it in the interest of the children that he be removed he would obviously accept such decision. He however stressed that he was of the view that some facilitation/mediation process be retained or put in place to facilitate the interaction between the parties. He also expressed the view that he did not deem it to be in the best interest of the children for him to be removed and thereafter for some new facilitator/mediator to start *de novo*. He emphasised the fact that he is the second facilitator in this matter after the previous facilitator; Sandra Hitchcock had twice previously resigned as facilitator.

[61] The crisp issues that remain for me to decide in this matter are:

61.1 Whether to set aside the directive of Craig Schneider dated 28 April 2016 and to interdict him from taking further steps or issuing further directives pending the finalisation of Part B.

61.2 Whether the parenting plan should be amended to the extent sought by the defendant in Part B of the application.

[62] It is a fact that the directive of Craig Schneider dated 28 April 2016, was replaced by the order of Le Grange, J dated 9 June 2016. In the second of the two orders issued by Le Grange, J on 9 June 2016, and by agreement the contact arrangements were stipulated in paragraph 1 (from sub-paragraph 1.1 through to 1.14). In paragraph 2 of the order the plaintiff was ordered to ensure that the children were transported between Rooi-Els and Melkbosstrand.

[63] It is however also a fact that in paragraph 7 of the aforesaid order of Le Grange, J: *"The facilitator shall not have the right (as agreed in paragraph 7.5.4 of the parenting plan) to make a decision and/or directive in the absence of either party's participation in the facilitation process".* Despite this order the facilitator Mr Craig Schneider on 13 March 2017 issued a directive, without any participation by or input from either party.

[64] Part B of this application, was by order of Le Grange, J converted to a counter-claim to be determined together with the action in case no: **9086/16**. The gravamen of the relief sought in Part B concerns the removal of a facilitator in its entirety from further adjudication of disputes, and by extension therefore the removal of Mr Craig Schneider, as facilitator.

[65] To the extent that Part B was incorporated in the action under case no: **9086/16**, I shall deal therewith hereunder when dealing with the matter under case no: **9086/16.**

[66] It is significant that in his counter-application the plaintiff also sought to have Craig Schneider's directive of 28 April 2016, amended. In addition the plaintiff sought an order authorising Mr Rob Sandenberg to carry out an investigation forthwith and compile a report setting out his findings and recommendations regarding the contact arrangements, the children's' psychological functioning, educational progress and general welfare and ultimately whether it would be in the best interest of the children for them to continue residing primarily in Rooi-Els or whether they should live in the Melkbosstrand area as prayed for by the plaintiff in the action under case no: **9086/16**.

[67] The defendant contends in her founding affidavit in support of the application, that the plaintiff is manipulating the facilitator Mr Schneider, who simply upon receiving a written complaint by the plaintiff changed his directives. She furthermore

contended that the plaintiff was using (and abusing) the facilitation process in order to exercise control over her and the children, and simply creates disputes over trivial matters. She continued to allege that the plaintiff uses the facilitators to continually harass her. It was, according to her, what resulted in Mr Schneider treating her as badly as she alleged in paragraph 34 of her founding affidavit. According to her, Mr Schneider issued a directive in terms whereof the children who were in Grade R were required to attend two different schools in two different places in the same week. This directive, according to her, was issued by Mr Schneider without having regard to the effect it would have on the children and despite indications by the teachers concerned that it would be most detrimental. The final nail was when he, according to the defendant, in an aggressive manner addressed her and, *inter alia,* declared that he had the power to take the children away from her.

[68] Both parties achieved some success in their application/counter-application in respect of Part A. The plaintiff in any event seeks an order that the defendant pays the costs of this application in the case of her opposing the relief sought in the counter-application, failing which that the court directs that the costs be costs in the main action (being under case no: 9086/16). I think it would be expedient to deal with costs in respect of the proceedings under case no: **8658/16** to be costs in case no: **9086/16.**

(iii) The action instituted by the plaintiff under case no: 9086/16:

[69] This action was undoubtedly launched by the plaintiff in reaction to the defendant's application under case no: **8658/16**. On the plaintiff's behalf it was in fact conceded by his counsel that the action was launched as a reaction to the defendant's unilateral decision to relocate with the children to Rooi-Els.

[70] Prior to commencement of the hearing and in his counsel's practice note the crux of this action was defined as a relocation dispute in respect of the minor children. At the heart of this dispute was the plaintiff's insistence that:-

70.1 The children must reside within a 20km radius of a school in the Melkbosstrand area.

70.2 The defendant must reside in Melkbosstrand in order for the parties to share residency, alternatively should defendant not agree to live in the Melkbosstrand area that the plaintiff be awarded primary care of the children. This is implied when he, in prayer 2.1, asks the court to delete clause 3 of the parenting plan marked "X".

[71] Since the summons in this matter was issued, Mr Rob Sandenberg's report was made available to the plaintiff and despite the recommendation therein (as well as the recommendation by the facilitator and other experts such as Janette Bytheway) the plaintiff still insisted, right to the end when he testified, on the relief sought in the summons and in particular that primary care of the children be given to him if the defendant and most importantly the children do not relocate to a place within a 20km radius from a school in Melkbosstrand.

[72] Plaintiff's counsel readily conceded in argument that the circumstances of this particular case render the issue of relocation somewhat anomalous if not academic. The children and defendant have been living in Rooi-Els with Dr Horn since January 2016 (now almost 18 months). They have by all accounts settled in to a routine, according to the school that they attend as well as others in the area who know the children and the defendant, who have seen them settling into the environment. The only person who seems to be convinced that both Rooi-Els and in particular the school in Pringlebay is not good for the children, is the plaintiff. His persistent argument that it is harmful for the children to be in an English Medium school and that they should be enrolled in an Afrikaans Medium school is bizarre and mind boggling to put it mildly. This is so particularly if regard is had to Mr Rob Sandenberg's opinion in this regard, especially given the realities in South Africa and the broader world these children are growing up in. It is once more an indication of the plaintiff's bloody-minded attitude not considering the best interest of the children.

[73] Counsel for the plaintiff repeated the latter's allegation in the summons that not only was the relocation to Rooi-Els done unilaterally without consultation or advice, but it was done with *mala fides* primarily aimed at creating distance between the plaintiff and defendant and in so doing reduce his contact with the children. This allegation, which was persisted with even by plaintiff's counsel when addressing me, is without substance and palpably in conflict with the facts. If the defendant was motivated by the desire to create more distance between herself and the plaintiff it would have been perfectly understandable as the relationship between the two is so bad that any proximity and contact is harmful to the children. Furthermore it is the uncontroverted and clear evidence of Rob Sandenberg that he could detect no

evidence of alienation in the children. What he did detect was signs of exposure of the children to the effect of parental conflict. He also in so many words in his report opined that he did not think that the defendant was being malicious in relocating but still the plaintiff persisted with his allegation until the end when his counsel argued.

[74] The vexed question of whether or not a proper case has been made out for me to order that the children and/or the defendant should leave Rooi-Els and move to a place within a 20km radius of a school in Melkbosstrand can only be decided with reference to what is in the best interest of the children. All other considerations pale into insignificance when considering this aspect.

[75] No matter what spin is given to the facts of the various experts including the directives by Craig Schneider, all are unanimous in advising that the best interest of the children in the current situation would be served by them staying in Rooi-Els with their mother with the necessary adjustments to be made to the contact arrangements to compensate for any loss in contact time that the plaintiff may experience. This will be evident from the various opinions of the experts listed hereunder:-

75.1 Craig Schneider's directive of 13 March 2017;

75.2 The report of Janette Bytheway dated 9 March 2017 annexed to the above directive;

75.3 Rob Sandenberg's report dated 26 October 2016.

[76] Against the above backdrop when one has regard to the law, as developed through the case law regarding relocation the following is borne in mind:

- It is trite that in matters of this kind the interests of the children are the first and paramount consideration. See *Jackson v Jackson* 2002 (2) SA 303 (SCA) at paragraph 2; *Van Rooyen v Van Rooyen* 1994 (4) SA 435 (C) at 439G-H; *H v R* 2001 (3) SA 623 (C) at 627H-628G.
- 'However, the Legislature did not intend the "best interests" of the child to be the sole or exclusive aspect to be considered because it did not prescribe that the child's "best interests" are the only factor to be considered or the sole determinant of the exercise of the court's discretion.' *B v M* 2006 (3) All SA 109 (W) at paragraph 146.
- In deciding whether or not relocation would be in the child's best interests, the court has to evaluate, weigh and balance a myriad of competing factors, including the child's wishes in appropriate cases. See *F v F* 2006 (3) SA 42 (SCA) at paragraph 10.
- 'The court must carefully weigh and balance the reasonableness of the custodian's decision to relocate, the practical and other considerations on which such decision is based, the competing advantages and disadvantages of relocation, and how relocation will affect the child's relationship with the non-custodian.' *Cunningham v Pretorius* (31187/08) [2008] ZAGPHC 258 (21 August 2008) at paragraph 5.
- In addition the decision by the custodian parent to relocate should be shown to be *bona fide* and reasonable. *Jackson v Jackson* 2002 (2) SA 303 (SCA) at paragraph 2.

- In the end, ‘what is required is that the court acquires an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the court must render a finding of mixed fact and opinion, in the final analysis a structured value-judgment, about what it considers will be in the best interest of the child.’ *Cunningham v Pretorius* (31187/08) [2008] ZAGPHC 258 (21 August 2008) at paragraph 9.

Furthermore, according to section 9 of the Children’s Act ‘[i]n all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.’ Section 7 of the Act sets out a lengthy list of factors which courts’ need to take into account when determining the best interests of a child. These include the nature of the relationship between the child and parents; the attitude of the parents toward the child and to the exercise of parental responsibilities and rights in respect of that child; the likely effect on the child of changed circumstances such as separation from either or both parents; the need for the child to remain in the care of his or her parent, family or extended family and to maintain a connection with his or her culture or tradition; the child’s age, maturity, stage of development, background, physical and emotional security and intellectual, emotional, social and cultural development; and the need of the child to be brought up within a stable environment.

[77] It is also according to Rob Sandenberg (Exh ‘HHH”), clear that in cases of relocation the following are the most important and pertinent aspects to consider:-

- Reasons for and *bona fides* of the proposed relocation;
- Age, developmental needs and adjustment of the children;
- Quality of parent child relationships;
- Psychological adjustment of the parents (such as whether a parent presents with a particular psychopathology which has direct implications for the safety and/or wellbeing of the children and/or former spouses;
- The nature of the relationship between the parents;
- Parenting skills;
- The likely effects of moving on the children's social and familial relationships; and
- The cultural and educational opportunities in both locations. (See para 1.5.6 on page 3 - cultural and educational opportunities in both locations by report of Rob Sandenberg handed in and received by the court marked "HHH".)

[78] Despite the repeated and vehement arguments that the decision to relocate was *mala fides* and motivated primarily to create distance between herself and the plaintiff and most importantly reduce contact between the latter and the children, Rob Sandenberg again after carefully analysing all relevant aspects came to the conclusion that the defendant was definitely not motivated by the desire to reduce contact between the children and the plaintiff. It is abundantly clear that Dr Horn had decided to make a life in Rooi-Els and that the defendant wants to make a life with him and therefore wanted to move to Rooi-Els so that she can live with Dr Horn, together with the children. This seems to be the only reason for the move.

[79] In order to support the argument that the move was not *bona fide* it was also contended that the defendant had made the decision unilaterally. This is also not correct as the record clearly reveals that:-

79.1 She had on 11 November 2015 addressed a letter to the plaintiff advising him that she would, as from 1 January 2016, relocate with the children and live with Dr Jan Horn at ---------- Road, Rooi-Els. She also invited him to let her know, by 15 November 2015, if the plaintiff had any concerns or questions in regard to the intended relocation, so that she may address such concerns.

79.2 On 13 November 2015 the plaintiff's attorney Mr C responded to this letter by addressing a 3 page letter to the defendant motivating why the intended relocation is not supported and why his client (the plaintiff) is opposed to the relocation.

79.3 On 16 November 2015 the defendant again communicated with the plaintiff explaining that the relocation is both reasonable and *bona fide*. She reminded the plaintiff that her right to relocate to a new home with a new partner is enshrined in her Constitutional right which includes her right to dignity and freedom of movement. The defendant further informed the plaintiff that as provided for in the consent paper she would proceed to refer the matter to the facilitator for an appropriate directive. It is rather revealing and significant that at this stage already the defendant openly acknowledged that due to the relocation the then contact arrangements would need to be adapted. This is clearly indicative of her *bona fides* and reasonable attitude in this regard.

79.4 On 21 December 2015 the facilitator Craig Schneider issued a written directive to the effect that pending an assessment by a mental health professional to be appointed, the defendant may move to Rooi-Els with the children.

[80] The rest of the aforementioned pertinent factors in cases of relocation were thoroughly considered in and discussed in annexure "HHH", the report by Rob Sandenberg. After careful analysis of these factors and having regard to information available to him by way of access to opinions and research in this regard Rob Sandenberg concluded his report by recommending, *inter alia,* that the children should be allowed to reside with their mother (the defendant) in Rooi-Els without in any way reducing the plaintiff's rights and responsibilities in regard to the decision making pertaining to the children.

[81] If regard is had to the fact that:-

81.1 By the time the hearing of this matter commenced on 15 March 2017 the children had already relocated and been living with their mother together with Dr Horn in Rooi-Els since January 2016 (some 18 months). The relocation was therefore in the words of plaintiff's counsel "a done deed".

81.2 The tender made on 14 March 2017 by the defendant and rejected by the plaintiff on 15 March 2017 envisaged as central characteristic that the children would remain in the primary care of the defendant (which

clearly implied them living in Rooi-Els as it was in fact a done deed at that stage).

In these premises it becomes unfathomable to why the plaintiff persisted in his demand that he children relocate to an abode within a 20km radius of Melkbosstrand.

[82] If the plaintiff was reasonable and motivated primarily by what would be in the best interest of the children I certainly would have expected him to accept the tender in part certainly to the extent where the residency and primary care of the children could by agreement have been resolved. If he had then rejected the tender in so far as the suggestion regarding his contact did not meet with his approval, the suggestion for contribution to the travelling, the removal of Craig Schneider as facilitator and the costs were not acceptable to him, those issues could then have formed the subject matter of a significantly shorter trial. The plaintiff doggedly and even in the face of overwhelming opinions by experts that it would be in the best interests of the children to remain in Rooi-Els, right to the bitter end of his testimony maintained that he wanted the children to relocate to a location within a 20km radius of Melkbosstrand. It became abundantly apparent to me that the plaintiff was consumed by his dislike for Dr Horn. When testifying he declared that even if Dr Horn was to be removed from the equation he was convinced that he would be able to resolve the issues amicably with the defendant. It also became clear to me that in his quest to deal with Dr Horn the plaintiff became completely de-focused and disregarded the best interest of the children.

[83] Regarding the rest of the prayers in the action under this case number it is significant to note that much of the same ground in so far as it related to contact and the children's schooling was covered by the plaintiff in his counter-application under case no: **8658/16**. To the extent that he may have needed to widen the relief sought in the counter-application that option was clearly available to him. However it is clear, as was in fact argued by counsel for the plaintiff, that this action was instituted in reaction to the urgent application brought by the defendant under case no: **8658/16**. In these circumstances it follows that the plaintiff's claims under this case number **(9086/16)** falls to be dismissed and are herewith dismissed.

[84] As far as the costs of this action are concerned it is not clear to what extent the plaintiff was prompted by legal advice to institute this action. However when he testified he displayed a determination to litigate and not to let go of the defendant, regardless of the effect on the children, which seems to suggest that he is not likely to be led blindly by legal advice given and that he is the type of person who goes after what he wants and stops at nothing. This is borne out by the fact that when he was confronted with the apparent cry for help by the children as reflected in Janette Bytheway's report of 9 March 2017, namely that they wish for their parents to stop fighting as it is hurting them, he responded by saying that he did not believe that the children had said so, suggesting that Janette Bytheway was lying about this, or that the latter must have misunderstood what the children had told her.

[85] In these circumstances the fairest order regarding costs would be that the plaintiff pays the costs of this action which costs will include the cost of counsel and

the qualifying and witness fees of Rob Sandenberg on an attorney and client scale. The plaintiff should also pay the costs of the application and counter-application in case no: **8658/16** on a party and party scale which costs will also include the costs of counsel.

OTHER MISCELLANEOUS ASPECTS:

[86] The following are some of the vexed and important issues that are at the heart of one or more of the above cases. It would therefore be appropriate, to look more closely at these aspects. Importantly some of these issues would go a long way to defining the ultimate order to be made in respect of these matters cumulatively:-

86.1 Co-parenting-what does it mean and what does it entail?

86.2 Should any future disputes be subject to facilitation or mediation?

86.3 In crafting the contact details who should bear the responsibility of ensuring that the children are transported between their place of primary residence in Rooi-Els and the plaintiff's place of residence, or should the responsibilities be shared and if so how much should the plaintiff be ordered to pay as a contribution towards such travelling costs?

86.4 Though the issue of maintenance and payment of school fees could conceivably be resolved in the maintenance court would it not be in the interest of finality, and possibly bringing an end to the on-going acrimony and bitter conflict between the parties, for me to make an order in this regard in keeping with the terms of the consent paper and

parenting plan. The primary motive for doing so would also be to bring an end to this in the interest of the children.

86.5 It has been suggested by more than one expert, and in particular Rob Sandenberg, that each parent be prevailed upon to engage in a process of personal psychotherapy. I am of the view that given the history of this matter and the apparent inability to be able to separate their issues from the children more would be required than just prevailing upon them. I am of the view that in the interest of the children, and as the upper most guardian of such children, I am not only vested with the authority to do so but feel obliged to go so far as to order the parents to subject themselves to the process of personal psychotherapy. In order to monitor the progress and to ensure that they comply with the order a method will have to be devised in terms of which there would be some reporting back by simply advising whether or not there has been compliance.

86.6 The defendant's failure to testify and the effect thereof.

86.7 The role of attorneys in litigation. This aspect relates to the evidence of both the plaintiff and Rob Sandenberg in relation to the latter's report "HHH". Specific focus needs to be placed on Mr Rob Sandenberg'sevidence about the role and/or interference by the plaintiff's attorney Mr C .

[87] I have had regard to what both Craig Schneider and Rob Sandenberg have said with regard to the necessity for facilitation. I have also considered the argument by counsel for the defendant that facilitation, in the opinion of Sandra Hitchcock, did not work for these parties. It was further argued that one of the main reasons for this is that facilitators issue directives which are binding on the parties. When either party is not happy with such directive it gives rise to all sorts of frustrations and all the unhappy party has to do is to declare a dispute and an on-going situation of conflict arises. Whereas with mediation there are no directives and in the event of a mediator not being able to resolve that dispute between the parties they then are faced with the daunting reality of having to approach court and litigate at exorbitant costs.

[88] I have also carefully considered the sentiments articulated by Mr Craig Schneider when he under oath in an affidavit motivated why he was of the view that his services as facilitator should not be terminated as it would entail a new facilitator having to start from scratch again.

[89] Without in any way having to make a finding on whether or not the defendant's allegations concerning Mr Schneider's treatment of her are well founded or not and without in any way seeking to reflect on his competence or otherwise to effectively perform the function of the facilitator it is abundantly clear that the defendant is extremely unhappy about her relationship with Mr Schneider. It is also abundantly clear that she has lost all faith and confidence in Mr Schneider and it would therefore serve no purpose to compel her to rely on Mr Schneider to objectively and impartially resolve differences between her and the plaintiff. In fact in

her tender of 14 March 2017, exhibit “NNN” in paragraph 1.7, the defendant proposes the appointment of a mediator failing which an alternative facilitator.

[90] In all the above circumstances I am of the view that the fairest to all and most importantly in the hope of serving the best interest of the children an alternative facilitator should be appointed.

[91] The fact that the defendant did not testify but only called a witness generated much debate. Counsel for the plaintiff argued that after Part B of the application brought by the defendant under case no: **8658/16** was converted to a counter-claim to be heard together with the action under case no: **9086/16** the affidavits filed in that application have no probative value unless the content of such affidavits are confirmed under oath. For this proposition counsel relied on the case *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) where the court specifically dealt with the status of affidavits in an application referred to trial. This case is distinguishable from the case under consideration in that Part B of the defendant’s application was not referred to oral evidence but was converted to a counter-claim to be heard together with the action.

[92] Counsel for the defendant responded to the notion that the affidavit in Part B of the application under case no: **8658/16** has no probative value by indicating that in matters concerning children there is no real onus. The process is more of an inquiry. She further pointed out that the matter was not in fact referred for oral evidence and

furthermore that the defendant had called as a witness Rob Sandenberg who testified about the issues covered by her aforesaid application.

[93] The further argument on behalf of the defendant was that the application under case no: **8658/16** remained an application. It was simply for reasons of expediency and convenience heard simultaneously with the trial in the action under **9086/16**. The affidavits, such as they were, remained the papers upon which the matter stood to be argued. It is not as if the dispute on the papers was referred to oral evidence. The only oral evidence in respect of which the trial was conducted was the action of the plaintiff under case no: **9086/16**. This argument has much merit. I am not convinced that the affidavits in the application **8658/16** which was heard together with the action under **9086/16** lacked probative value. I am also of the view that the defendant's refusal to testify in no way adversely affected the merits of her case and certainly does not warrant any adverse inferences to be drawn.

[94] Our law has fortunately developed to the point where "the best interest of the child" approach is now enshrined in the Constitution, namely section 28(2) which proclaims that: "A child's best interests are of paramount importance in every matter concerning the child". Although this concept of the child's best interest is recognised not only in our country but international instruments it is a fact that the concept and principle involved has not yet acquired specific content. It has not yet been subjected to any sustained analysis designed to crystallise its precise meaning.

[95] In an letter to the editor titled “The high court as upper guardian of all minor children” in the *Advocate* (Vol 16, No 2, August 2003) written by D Bradshaw of the Family Advocate’s Office in Durban, the writer quotes an example where he approached the court in an urgent application in his capacity as Family Advocate to stop a child’s mother from selling a fixed property at half its market value. It was emphasised during the hearing of the urgent application that the High Court, of which the Family Advocate is an extension, derives this power as the upper most guardian from the common law. It was further argued that not stopping the sale of the property at half its market value would deprive the minor child of financial resources that he would need in future. An interdict preventing the sale of the property would protect the financial interests of the minor child. In that particular case the family advocate was reminded that he had a duty to act in such an instance to protect the interest of the minor child.

[96] I similarly am of the view that I would be failing in my duty if I did not order the parents to undergo such psychotherapy.

Co-parenting:

Co-parenting is not a new term, but has gained traction since its inclusion in the Children’s Act. Although the word “co-parenting” isn’t directly mentioned in the Act, it is inferred in section 18; full/specific parental responsibilities and rights and section 30; co-holders of parental responsibilities and rights.

In looking at the development of the law in relation to the protection of children's rights in South Africa in particular the introduction of the Children's Act, Goosen, J held as follows in *PDP v MPDP* [2013] JOL 30128 (ECP):

> *"[12] A reading of the Act indicates that it seeks to accord to parents equal responsibility for the care and well-being of their children and that it seeks to ensure that, as far as may be reasonably possible, parental responsibilities and rights are exercised jointly, in the best interests of children.*
>
> *[13] The Act does not use the common-law concepts of "custody" and "access". Instead it refers to "parental rights and responsibilities" which is defined as those responsibilities and rights referred to in section 18, namely, the responsibility and right to care for the child; to maintain contact with the child; to act as guardian of the child and to contribute to the maintenance of the child. The concept of "care", as defined, corresponds with the common-law concept of custody and that of "contact" with the concept of access to a child. …It is sufficient to note that, in terms of section 18(1) a person may have either full or specific parental responsibilities and rights in respect of a child, such being assigned by agreement in accordance with section 22 or as may be determined by order of a court of competent jurisdiction.*
>
> *[14] …The award of custody and the regulation of access to minor children, pursuant to the Children's Act, now involves a determination of the parental responsibilities and rights of each parent and the regulation of care, contact and maintenance responsibilities and rights in accordance with such determination."*

Further the Act allows for circumstances in which the parents aren't living together but still enjoy parental responsibilities and rights. Under Part 2 of Chapter 3 of the Act it deals with the co-exercise of parental responsibilities and rights. Goosen, J stated further:

> *"[19] The Act envisages that co-holders of parental responsibilities and rights should exercise such rights upon a mutually agreed basis. The mechanism by which this is to be achieved is a "parenting plan". A parenting plan is however, not defined by the Act. Section 33(1) provides that co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan which determines "the exercise of their respective responsibilities and rights in respect of the child".*
>
> *[21] Section 33(2) makes provision for those circumstances in which the co-holders experience difficulties in relation to the exercise of their rights and responsibilities. In such circumstances the subsection requires that the co-holders ". . . before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights . . .". Where such agreement cannot be achieved the Court may be approached to determine the exercise of parental responsibilities and rights."*

In *BB v G* 2014 JDR 1784 (ECP), Mey AJ, had to decide on the extent of contact a father should have with his 8 year old son. The family advocate undertook two enquires in regard to the placement of the son and at paragraph 71 the second report indicated that:

"… in order for successful co-parenting to take place the parties need to be able to communicate properly and must fully support each other in their relationship with the child. Consistent parenting routines would also need to be implemented in both households. She stated that in 2011 the antagonism between the parties was extremely high, to the extent that the police were involved in the parties' disputes. The antagonism was so intense that the plaintiff and defendant refused to be consulted together at the family advocate's offices at the same time. This has continued and the parties have expressed that they are unable to communicate. She did not consider it effective co-operation or co-parenting for the parties to consult G's [the son] teacher's separately and to attend school activities only when G is in their care, such arrangement having been made in recognition of their inability to communicate and be present together. She is unable to conceive how any co-parenting arrangement will be successful in the long term."

Although the Act gives guidelines as to the parenting plan and the responsibilities and rights of each parent under section 33 (3) - namely where and with whom the child will live; maintenance; contact; schooling and religious upbringing – it does not specifically define the role of each parent. It is up to the holders of these rights (the parents) to determine their respective role and responsibilities through effective communication.

Role of attorneys:

[97] I regrettably have to deal with the role of attorneys in litigation generally and more specifically in these matters due to the peculiar circumstances of same.

[98] In *Magistrate M Pangarker v Botha* 2015 (1) SA 503 (SCA) at paragraph 38 the SCA, in quoting *Brenner's Service Station and Garage (Pty) Ltd v Milne and another* 1983 (4) SA 233 (W), once again made it clear that:

> *"[…] the proper function of the courts is to try disputes between litigants and that attorneys should not allow themselves to descend to the level of manipulating the court's procedures so that their true purpose is frustrated."*

The SCA also stated that:

> *"An attorney is subject to a code of ethics and has a duty to the court to conduct himself or herself in a proper manner. He or she has a responsibility to act honestly and openly towards his or her colleagues."*

[99] Together with the role of the attorney I have also considered the role of the expert witness in court. An expert witness is an individual who testifies in a court case to enable those involved with the issues at hand to legally rely upon the expert's specialised knowledge, to offer an opinion in regards to the evidence or facts before the court. The role of an expert witness in litigation is to assist the court in the administration of justice by providing an opinion or factual information based on the expert's competence in a subject which is outside the knowledge, skill or expertise of most people.

[100] An expert witness is obliged to provide independent assistance to the court. This he or she can only do by remaining objective and furnishing an objective unbiased opinion.

[101] It has often been said that an expert witness is there to assist the court to come to a just decision and is not the witness of the litigant parties and most definitely not the witness of the party who commissioned the services of the expert and/or who pays the expert's fees.

[102] The above context is particularly relevant in this case as it is common cause or it was not contested that:-

102.1 The plaintiff sought and obtained a court order authorising him to appoint a clinical psychologist of his choice. This choice was narrowed down to one of either Mr Rob Sandenberg or Mr Larry Lubenstein.

102.2 The plaintiff was responsible for the payment of the fees of such clinical psychologist's investigation and report.

102.3 The plaintiff chose Mr Rob Sandenberg and duly engaged his services for this purpose. The main reason for the referral was a request by the plaintiff for Mr Rob Sandenberg to complete an independent psychological assessment in order to supply the court with an expert opinion regarding whether or not it would be in the interest of the children, then aged 6 years, to reside with their mother in Rooi-Els.

102.4 The process of assessment was duly embarked upon by Mr Rob Sandenberg who on 26 October 2016 completed his report "HHH".

102.5 After payment of his fees this report was duly released by him and made available to the plaintiff's attorneys.

102.6 Two days later, on 28 October 2016, the plaintiff addressed a long 2 page email to Rob Sandenberg wherein he objected bitterly to the aforesaid report and in particular the recommendations under paragraph 4 thereof when he recommended that the children should be allowed to reside with their mother in Rooi-Els. This email was also handed in to court by the plaintiff and was received and marked as annexure "JJJ". It is most revealing that this email of complaint has as its opening gambit a statement wherein the plaintiff stressed the fact that he was highly disappointed in Rob Sandenberg as the latter had been appointed by him and was his specialist who had not reverted to him before he formed his opinion and finalised his report. The plaintiff clearly expressed the view that he would have expected Rob Sandenberg to first revert to him to discuss his possible findings before finalising same.

102.7 Rob Sandenberg duly responded to the plaintiff's email "JJJ", on 4 November 2016 when he emailed a detailed reply to all the objections/concerns/allegations made against him in "JJJ". This email was also handed in by the plaintiff and was received by the court and marked "MMM".

102.8 Shortly after the release of the report Rob Sandenberg received an email from the plaintiff's attorney Mr Reed Corrin in essence also complaining that the recommendations/findings did not accord

favourably with his client's desired outcome. Rob Sandenberg, when he testified, which testimony was not disputed, informed the court that Mr C argued that he should have told the plaintiff beforehand what his views were particularly because those views were not going to support the plaintiff's case. He further advised that Mr C asked him to amend his report so as to favour the plaintiff. Rather startlingly he continued to testify that Mr C very strongly argued that:

102.8.1 He was the plaintiff's expert and was meant to have furnished a report favourable to the person who was paying him, in this case the plaintiff.

102.8.2 That if the report at that stage was favourable to his client, the plaintiff, the latter would have enjoyed a distinct advantage and might have achieved success particularly as the defendant was at that stage not legally represented.

102.8.3 In response to Rob Sandenberg stating that if he were to relent and do as the plaintiff and Mr C were asking him to do, namely to change his report, he would be nothing other than a "hired gun" and would cease to be objective and independent. Mr C stated that all experts are "hired guns".

102.9 The report "HHH" was not made available to either the court or the defendant until the plaintiff was compelled to do so by the court order of Goliath, DJP on 29 November 2016.

102.10 The plaintiff refused to place the report before court and it was only when the defendant under cover of a notice in terms of Rule 36(9)(a) and (b), on 9 March 2017 filed a report at court that it became part of the court papers.

[103] When it was put to Rob Sandenberg that perhaps he misunderstood what Mr C was asking him to do and that he was possibly requesting him to amend the report, he responded by saying that he knows the difference between being asked to change his opinion to suit a particular party and to amend a report where such an amendment would be appropriate. He was sure that Mr C distinctly told him that if the plaintiff had known what his opinion was going to be and because it would not have favoured him the plaintiff would not have continued to engage his services to the end where a report was produced. He was left with the distinct impression that according to Mr C the plaintiff would then have obtained the services of another clinical psychologist, one who would have been prepared to produce a report that the plaintiff wanted. When he made it clear that he was not prepared to stoop to that level he was instructed by Mr C not to make the report available to the defendant's legal team.

[104] This aspect of the evidence relating to Rob Sandenberg's report, the efforts by the plaintiff and more specifically his attorney Mr C to prevent this report from being made available to the defendant and to the court, the extent to which Mr C was seemingly prepared to go to see that this report was either changed or if not was not disseminated and the apparent disregard of the rules of ethics has caused me

tremendous disquiet. I have agonised about this fact and most importantly as to what is my responsibility in dealing with this knowledge and disquieting feature. After considering all aspects and in particular what would be in the interest of justice and ethical practice of a practitioner I am constrained to order that this judgment be transcribed and sent by the court registrar to the President of the Cape Law Society, who is hereby called upon to attend to this matter and take such steps/actions as it may deem necessary under the circumstances.

CONCLUSION:

[105] In all of the above circumstances I find that the relocation of the children, together with the defendant their mother Mrs S to Rooi-Els is in the best interest of the children. It follows that the children will enjoy the right of primary residence together with their mother, the defendant, who shall also be the primary care giver of the said children. The order that shall follow these conclusions and findings shall in no way preclude the defendant from, in future, relocating providing such relocation is *bona fide*, reasonable and in the best interest of the children.

[106] I further find that one of the inevitable possibilities of divorce is that one of the previous spouses may for good reason need to relocate. If this happens to be the spouse who is the primary care giver and enjoys the rights of residency of the children, that relocation may frequently cause some strain on the rights of contact of the non-custodial parent. This is unavoidable and as long as the relocation is *bona fide*, reasonable and in the best interests of the children it must be permitted. Having

said that it is a logical consequence that the custodian parent may have to adjust, and if necessary make sacrifices with regard to his/her rights of contact to compensate for the non-custodial parent's reduced contact due to the relocation. *In casu* the defendant has recognised and acknowledged this fact from the moment that she decided to relocate to Rooi-Els. A big bone of contention has been the transporting/travelling arrangements and concomitant costs involved in the children moving between Rooi-Els and the plaintiff's abode and back. There seems to be some consensus that the defendant would have to engage the services of some or other person to transport the children and that the plaintiff would make a contribution towards the costs so incurred. There is currently a dispute between the parties as to what would constitute a reasonable contribution under these circumstances.

[107] It is common cause that the consent paper, to which is annexed a parenting plan entered into by the parties at the time of the divorce, has been amended by them in various respects over the years. In so far as it may be considered necessary I would confirm that the parties retain joint parental rights and responsibilities as provided for in the Children's Act 38 of 2005. They shall also retain joint guardianship of the children as envisaged in section 18(2)(c), 18(3); 18(4) and 18(5) of the Children's Act.

ORDER:

1. Both plaintiff and defendant's counsel presented me with draft orders for consideration. The plaintiff's draft order was annexed to heads of argument filed,

whilst the defendant's draft order was embodied in annexure "NNN". In addition to these draft orders comprehensive heads of arguments were filed. I am indebted to both for their endeavours in this regard.

2. In respect of case no: **2179/14**, the plaintiff is ordered to pay the costs of the application and the counter-application, including the cost of counsel, on an attorney and own client basis.

3. The relief sought in case no: **8658/16**, both in respect of the main application as well as the counter-application was, by order of Le Grange, J on 9 June 2016 dispensed with on the basis that an interim order was granted in respect of part A (dealing in the main with contact of the plaintiff with the children in the interim pending finalisation of part B as a counter-claim in case no: **9086/16)**. The issue of the costs of the main application and the counter-application stood over for later determination at the hearing of the main action under case no: **9086/16.** In these circumstances part B of the defendant's application in case no: **8658/16** is upheld and the plaintiff's counter-application is dismissed. Plaintiff's claims in case no: **9086/16** is dismissed.

4. In all of the above circumstances the defendant is ordered to pay the costs of part A of the application and counter-application in case no: **8658/16,** together with the cost of counsel on a party and party basis. In respect of case no: **9086/16** the defendant is ordered to pay the costs on a scale as between attorney and client,

such costs to include the costs of the expert Mr Rob Sandenberg. Plaintiff is also ordered to pay the cost of part B of case no: **8658/16**, which was converted to a counter claim in case no: **9086/16,** on a scale as between party and party.

5. Plaintiff and defendant are both herewith ordered to engage in a process of personal psychotherapy. The prime purpose of such engagement would be to enable the parties to acquire effective co-parenting skills. Each party is at liberty to choose a psychotherapist of his/her choice. Each party shall be liable for the payment of the costs of such psychotherapy.

6. The parties shall participate and fully cooperate with the respective therapists. The parties shall each attend as many sessions as may be deemed necessary by his/her therapist, and whatever else may be reasonably required of him/her by the therapist, and shall not stop attending such therapy sessions without the written advice of the said therapist that such sessions can be terminated. The individual therapists are specifically precluded from reporting in any way breaching patient/therapist privilege by in any court matter so as to allow each party the fullest freedom to engage and cooperate with the therapist.

7. The respective therapists shall report to, ONLY in relation to compliance, the facilitator at least every 3 months from the date of appointment, for the first 12 months, should the sessions still be on-going. Should either of the party's sessions exceed 12 months from commencement then the therapist shall submit a report to

the facilitator at intervals of no longer than 6 months (but can submit reports in the interim if deemed necessary), until termination of the sessions.

8. The facilitator need not file the therapists' reports at court. However, upon receipt of a report from either therapist indicating non-compliance or obstructive behaviour by the party concerned, the facilitator shall within 10 working days in writing by pre-paid registered post and email or any other available social media call upon the party concerned to comply with the reasonable requirements of the said therapist. Should the party concerned continue with his/her non-compliance the facilitator shall within 30 days from receipt of the said notification from the therapist set the matter down under case no: **9086/16** with case no: **8658/16** on the urgent roll for the court to adjudicate on the alleged non-compliance/contemptuous conduct of the party concerned.

9. Due to the on-going high conflict post-divorce inability to effectively communicate with each other the parties are hereby ordered to engage in a process of communication coaching for a period of at least 18 months from date of this order. This process shall entail, and the parties are each hereby ordered to:

9.1 Engage a psychologist of his/her own choice (other than the aforementioned psychotherapist) and be responsible for the costs of such psychologist. The parties shall each consult with the other's psychologist (in other words plaintiff shall consult with the defendant's psychologist and the defendant in turn shall consult with the plaintiff's

psychologist) in the event of either needing to communicate with the other;

9.2 All communication between the parties shall first and foremost go to the practitioner that is designated to consult with them. This practitioner will modify the email communication and send it back to the party to be sent to the other's practitioner in order to assist in developing a more reasonable way of communicating.

9.3 The final email will then be sent through to the other party via the practitioner consulting with that other party.

9.4 The parties will each also attend the required sessions with their designated practitioner who will help them through a process of cognitive restructuring to start to think of the other in a more reasonable manner and one that is conducive to co-parenting.

9.5 Both practitioners will be in constant contact with the facilitator, if necessary

9.6 The facilitator shall have exactly the same duties and rights as embodied in paragraph 7 above.

9.7 Each party shall engage the services of a psychologist within 30 days from date of this order, consult with the latter explaining the purpose of this engagement. No communication whatsoever shall be addressed by one party to the other except than through his/her respective appointed practitioner.

9.8 If the parties' respective attorneys need to be appraised of these communications, the parties are at liberty to advise their attorneys of the content of the communication.

10. The parties shall remain jointly responsible for parental duties and enjoy joint parental rights in respect of the children as follows:

10.1 The children shall remain in the primary care of the defendant; the children's primary residence will also remain with the defendant;

10.2 Both the children (together with the defendant) are herewith authorised to remain at Rooi-Els such relocation herewith being approved.

10.3 To the extent that the contact and other rights and responsibilities outlined hereunder are in conflict with paragraphs 4.1 to 4.9 of the aforesaid parenting plan marked "X" and annexed to the consent paper which was incorporated in the final order of divorce under High Court case no: 17907/12, the provisions of this order shall apply.

10.4 The plaintiff will from the first weekend following this order, continue to exercise contact with the children who will spend three weekends in one month and two weekends in the immediately succeeding month with the plaintiff. The weekend will ordinarily commence from 15:30 on Friday to 17:00 on the immediately following Sunday. If the weekend is preceded by a public holiday or special school holiday on the Thursday then such weekend will commence on the Thursday at 15:30 and terminate on the immediately following Sunday at 17:00. Likewise if the weekend is followed by a public holiday on the Monday,

but commences on the Friday then the weekend will end at 17:00 on the Monday public holiday.

10.5 The defendant will be responsible and take all steps necessary to ensure that he children are transported to and be available for the plaintiff to collect them at the Engen False Bay One Stop Service Station on the N2 situated just after Somerset West mall exit (direction Somerset West to Cape Town) at the beginning of the plaintiff's contact weekend, or holiday period. The defendant would likewise be responsible for and do all things necessary to collect the children at the same place (Engen False Bay One Stop Service Station on N2 just outside Somerset West mall exit direction Somerset West to Cape Town) by not later than 17:00 at the end of such contact period, provided that the plaintiff shall contribute R500-00 per trip (that is dropping the children being one trip and fetching them again being another trip). In other words during the months when the plaintiff would have the children with him for 3 weekends he would be liable for an amount of R3 000-00, whilst in the month that he has them for 2 weekends he will be liable for R2 000-00 for that month. These travelling cost contributions shall be paid by the plaintiff in advance into an account, the details of which shall be provided by the defendant to the plaintiff forthwith. These contributions will likewise be payable in respect of any other contact period as well.

10.6 Regarding the school holiday contact, the short holidays (April and September) shall alternate and the long holidays (June/July and December/January) will be shared. Sharing of the June/July and December/January holidays shall alternate, such that if the children spend Christmas with the plaintiff then they should spend New Year's day with the defendant. This arrangement shall alternate annually. Should the children spend Christmas with the plaintiff and New Year's day with the defendant one year, such contact shall alternated the following year, so that the party who had the children at Christmas the one year shall have them for New Year's day the following year.

10.7 The parties shall be allowed to spend, Father's Day/Mother's Day with the children respectively, even though such day may not fall on the party's contact weekend.

10.8 Each party shall be entitled to spend at least 4 hours on his/her own birthday, as well as the children's birthday even though these days do not form part of his/her contact weekend.

10.9 Each party shall be entitled to have telephonic contact with the children at least twice a week and once during the weekend when he/she is not with the children. The children shall be entitled to contact the plaintiff at will, which contact shall be facilitated by the defendant.

10.10 The plaintiff shall pay all the amounts envisaged in paragraph 3.4 of the consent paper styled “Skikkingsooreenkoms” dated 24 January 2013 marked “B” and incorporated in the divorce order marked “A” under case no: 17907/12. The plaintiff is specifically ordered to pay any and all arrear amounts in respect of the items listed in this sub-paragraph of the consent paper. The arrears are to be calculated by the facilitator dating back to when the children commenced schooling, which shall include the time they spent in Grade R, to the date of this order. The amount so calculated by the facilitator shall be payable by the defendant within 30 days from the date of being called upon to do so by the facilitator.

10.11 To the extent that the children may have attended a private school and may continue to do so, the plaintiff will only be obliged, unless ordered otherwise by a court, to pay such fees as would ordinarily be paid to a public school in the area.

10.12 The children will continue to attend therapy with Janette Bytheway, the clinical psychologist who has seen the children since 2014. They shall attend such therapy with Janette Bytheway at least once a month. The plaintiff shall responsible for the costs of Janette Bytheway, as well as the cost of feedback sessions and the cost of providing any reports to

the facilitator, if and when such reports may be required by the latter. Both parties will be obliged to attend on Ms Bytheway for feedback sessions, if and when required by her. The defendant will be responsible for transporting the children from Rooi-Els to Janette Bytheway and back so that they attend the therapy with her. The defendant shall be responsible for the cost of such transport.

11. The services of Mr Craig Schneider are hereby terminated with immediate effect. An alternative facilitator shall be appointed forthwith and in any event not later than 15 working days from the date of this order. The terms of appointment and rights and powers of the facilitator shall be strictly in accordance with the provisions of paragraph 7 in its entirety, of the parenting plan marked “X” and annexed to the aforementioned “Skikkingsooreenkoms”.

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PARKER, AJ