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**OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA
HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 10128/2017

44171/2017

Date of Hearing: 31/05/2018

Date of Judgment: 05/06/2018

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

K R

Applicant

And

S B (nee R)

Respondent

JUDGMENT

MASHILE J:

[1] The Applicant and the Respondent are x-wife and husband. In order to avoid confusion I shall henceforth refer to them as R and B and parties shall mean both of them. Of their relationship as husband and wife was born J. R (“the minor child”). Serving before this court were two applications, one launched by B and the other by R. The former pertains to the following:

- 1.1 Suspension of R’s rights and responsibilities of guardianship concerning the minor child pending finalisation of Action proceedings launched under case number 28039/2015 (the “Action Proceedings”);
- 1.2 The second prayer is in terms of Section 28 of the Children’s Act (read with Sections 18(2)(c) and 18(3)(c)(iv)) and it relates to the suspension of the requirement that the consent of R is necessary for any application for the attainment of a passport for J, until such time as J attains the age of majority, failing which, and only where prayer 1 is not granted, until the finalisation of the Action Proceedings;
- 1.3 Suspending the requirement in terms of Section 28 of the Children’s Act (read with Sections (read with Sections 18(2)(c) and 18(3)(c)(iii) thereof), that the consent of R is necessary for the departure or removal of J from the Republic of South Africa, until such time as J attains the age of majority, and subject to certain provisos as set out in the Notice of Motion;
- 1.4 Costs of the Application on the attorney and client scale.

I shall henceforth refer to this application as “the travel application”.

- [2] The second application is one brought by R against B, under case number 10128/2017, for an application to compel B to conclude a mandate with expert Dr. Robyn L Fasser, in order to submit B and the minor child to an assessment to determine R’s rights of access to the minor child (“the Assessment Application”).
- [3] Both these applications were settled on 28 May 2018 but the parties could not agree on who should bear the costs. The matter was then stood down until 31 May 2018 for argument on costs. R’s Counsel asserted that there should be no cost order because both parties believed that they were acting in the best interest of the minor child when they defended or launched their respective applications.
- [4] In justification of the above, Counsel for R referred to the case of *McCall v McCall* 1994 (3) SA 201 (CPD) at 209B-C where the court declined to make a cost order on the ground that in contesting the case, the parties believed that they were acting in the best interest of the minor child and that the outcome did not make the one or the other a winner or loser. The same conclusion was also reached in *Ford v Ford* (52/2005) [2005] ZASCA 123; [2006] 1 All SA 571 (SCA) (1 December 2005) at paragraph 27. The reason for refusing to make a cost order in this case was that both parties acted in good faith as they thought that they were acting in the best interest of the minor child. There are two further cases the outcome of which is similar to these ones.

- [5] B's submission insofar as the assessment application is concerned is that R should be saddled with a cost order. She argues that the need for the appointment of an expert to assess was brought about by R's lack of exercise of his right of access to the minor child for a period of three years. It was not challenged that B has always been prepared to submit herself and the minor child to an expert who would be prepared to include a confidentiality clause whose purpose would have been to prevent and protect the minor child of the fact of her abuse.
- [6] B asserts further that R was also reluctant, without reason, to conclude a separate agreement to give effect to confidentiality. Again, it was not refuted that R conceded in his letter dated 10 June 2015 that his own past actions have led to the current situation of him not exercising access to the minor child. She states further that both the assessment and the assessment application therefore became necessary as a direct result of R's own behaviour.
- [7] B argues further in this regard that R at no stage proffered reasons for his refusal to include the confidentiality clause, notwithstanding that he was requested to do so as early as March 2016. It is only after more than two years that R is acceding to B's request of the inclusion of the confidentiality clause. For her to achieve this she had to oppose the assessment application at great cost.
- [8] The Assessment, she maintains, was fatally flawed in law from inception, as it was premised on an agreement to agree. R was made aware of this fact in May

2016, which was prior to launching the Assessment Application. Insofar as the assessment application is concerned, R has ultimately conceded that the confidentiality clause is necessary hence the parties draft order couched in the manner it is.

[9] It is trite that the successful litigant is entitled to his/her costs. R's total concession as evidence by the draft order makes one wonder whether there was any need to have refused to include the confidentiality clause whose objective was to protect his own child in the first place. During Argument in court, I raised R's refusal to agree to the inclusion of the confidentiality clause with his Counsel. The answer was that he believed that such a clause could prejudice him in the future but Counsel stopped short of stating in what way the clause could possibly have been detrimental to him in the future.

[10] It is the opinion of this court that the reason behind B's persistence that the confidentiality clause be present before she could agree to subject both herself and the minor child to an assessment was sensible and one that was directed at the protection of what would be in the best interest of the minor child. For R to have refused to agree for a period of two years and only concede at the doorstep of the court should be a reason enough to slam him with costs of the application. Besides, it is clear that B emerged victorious in this application and as such she should not be deprived of her right to payment of her costs by R.

[11] In addition, R has conceded that the need for the launch of the assessment application was of his own making. If that is the case, why should the resultant costs be the responsibility of an innocent party? R brought these costs upon

himself and must in the circumstances shoulder them. The *MacCall* and *Ford* cases supra and the other two mentioned in the heads of R's Counsel find no application here. They are distinguishable to the instant case insofar as they dealt with situations where the parties genuinely believed that they were acting in the best interest of the minor child. While I hold the view that R must pay costs, I do not believe that a case for punitive costs has been made.

[12] I turn now to the travel application. It is apparent that the process leading to the final termination of the parties' relationship, like many others of the kind, could not have been easy and smooth. R is said to have been at all times, without any persuasive reasons, either refused to consent to the minor child travelling abroad, or consented to her travelling abroad or obtaining the renewal of her passport, but then acted to frustrate her ability to obtain same and/or travel, such that his consent becomes meaningless as it is academic.

[13] The worst of all this is that R sets out no basis for his conduct in his answering affidavit. This leads B to assume, correctly so in my opinion, that he simply wanted to deprive the family opportunity to travel abroad for vacations. His conduct was impelled by malevolence emanating from his separation with B. Faced with R's attitude, B found herself compelled to launch the Travel Application.

[14] Like in the case of the assessment application, he waited until the very last minute only to agree to the relief sought by B in the Travel Application, which ought not to have been necessary in the first place. For those reasons B maintains that she should be awarded the costs of this application as well.

[15] In the absence of any compelling reasons why he conducted himself in the manner he did, I find myself obliged to accept that it was indeed out of spite. He certainly ought not to have gratuitously refused to grant consent thereby depriving the minor child of opportunity to broaden her knowledge and experience of other cultures in the world. Ordinarily one would have thought that he might have been concerned that the minor child would not come back to this country once taken out. However, this could not have been the case because firstly, he does not say so in his affidavit and secondly, B works and has property in this country. This of course would make it difficult for anyone to leave this country permanently.

[16] One would be justified to say that it has not stopped many others who left this country. The point is that he is silent in his answering affidavit on why he refused until forced by this application to give his consent. I do not think that one can assume that he believed that he was acting in the best interest of the minor child. On the contrary, the impression that one gets is that his delay was to get back at B. Again, I feel that R must be visited with a cost order to discourage him from embarking on any future gratuitous litigation. All said, I do not think that a punitive cost order against R is appropriate.

[17] I make the following order in terms of the Assessment Application:

17.1 B and R shall subject themselves, together with the minor child to assessment by a suitably qualified psychologist, social worker or the similar (to be

nominated by B on or before 30 June 2018), such that a forensic report as to whether it is in the minor child's best interests that R has contact with her can be prepared by such psychologist. The psychologist shall be appointed on terms acceptable to the parties, including confidentiality, and the parties will share equally the psychologist's cost of preparing the report;

17.2 R shall withdraw his request to the Family Advocate to conduct an enquiry and/or take such other action as may be necessary to cause the enquiry to not proceed, given that such would be duplicative with the report to be prepared in the order above;

17.3 Costs of the Assessment Application are to be paid by R.

[18] I make the following order in terms of the Travel Application:

18.1 R's rights and responsibilities of guardianship in terms of section 28 of the Children's Act, 2005 and specifically section 18(3)(c)(iii) thereof, requiring his consent to departure and removal of the minor child from the Republic, be and is hereby suspended until such time as the minor child attains the age of majority;

18.2 The requirement in terms of section 28 of the Children's Act, 2005 and specifically in respect of section 18(3)(c)(iv) thereof, requiring the consent of R in any application for a passport for the minor child, be and is hereby suspended until such time as the minor child attains the age of majority, provided that if the

Action Proceedings launched under case number 28039/2015 order that such rights no longer be suspended, then the suspension shall be lifted;

18.3 Costs of the Travel Application are to be paid by R.

BA MASHILE
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

APPEARANCES:

For the Applicant: Adv W Steyn

Instructed by: Keowan Y R Incorporated
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For the Respondent: Adv G Y Benson

Instructed by: Webber Wentzel Attorneys
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