

FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, PORT ELIZABETH JUDGMENT

PARTIES: **A K VS M C K & ELIZABETH CROUSE N.O - CASE NO: 2256/08**

(a) Registrar:

(b) Magistrate:

(c) High Court: **EASTERN CAPE HIGH COURT, PORT ELIZABETH**

DATE HEARD: 25/06/09

DATE DELIVERED: 30/07/09

JUDGE(S): PILLAY J.

LEGAL REPRESENTATIVES –

Appearances:

(i) for the Appellant(s): ADV. GOOSEN, ADV. JOOSTE

(ii) for the Respondent(s): ADV. P.SCOTT

Instructing attorneys:

(a) Appellant(s): ANTHONY DELPORT & UNWIN

(b) Respondent(s): JANKELOWITZ & SCHARGES

CASE INFORMATION -

(a) *Nature of proceedings:* DIVORCE PROCEEDINGS

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, PORT ELIZABETH)

CASE NO: **2256/2008**

In the matter between:

A K

Applicant

And

M C K

1st Respondent

ELIZABETH CROUSE N.O

2nd Respondent

(IN HER CAPACITY AS CURATOR AD LITEM ON BEHALF OF THE MINOR CHILDREN
C AND K K)

JUDGEMENT

Pillay J

This is an application in terms of Rule 6(5)(g) of the Uniform Rules of Court for the referral of the matter for the hearing of oral evidence on two very specific interrelated issues viz:

- (c) Whether the refusal by the minor children to have any contact with the applicant is in any manner caused by and/or a manifestation of parental alienation syndrome; and

- (d) Whether and to what extent the existence of parental alienation syndrome or any symptoms thereof is as a result of any conduct, whether in the form of an act or omission, on the part of the first respondent.

The applicants also seek authority, pending the granting of such an order, to subpoena any person in relation to these specific issues.

The application is essentially based on difference of opinion of a number of psychologists who were asked to deal with the matter in so far as their expertise allowed.

Background

The applicant and first respondent were married to each other and two children, C (born 1 March) and K (born 4 March) were born out of it. This marriage relationship was ended by an order of divorce in May 2004, incorporating a settlement agreement. This agreement made provision for custody of the aforesaid minor children ("the children") being awarded to the first respondent and subject to the applicant's right of reasonable and structured access.

It appears that the applicant has been unable to exercise his rights to access to the minor children whether intermittently or at all. He blames his former wife, the first respondent, for the situation.

He took legal advice and as a result instituted proceedings in this Court seeking, in effect, the restoration and rehabilitation of the relationship with the minor children and/or specifically seeking first respondent to be required to be actively involved in this process.

On the 16 October 2007 Part 'A' of the main application was dealt with and, based on an agreement between the parties, it was ordered inter alia, that the applicant and first respondent, together with the said minor children engage in therapy sessions with two clinical psychologists with the aim of 'normalising' the arrangement of access to the children in accordance with the terms of the order of divorce.

In terms of Part 'B' of the main application, applicant seeks the following relief:

- "1. That the two minor children, C K and K K, be placed in foster care as recommended by Mrs C.Watson, the director of the MTR Smit Children's Home;
2. That the minor children remain in such foster care until such time as Dr. Gillian Smale reports to the Family Advocate's office that the family reintegration process has been finalised.

3. That the Family advocate so reports to the above Honourable Court and recommend to the above Honourable Court a parental plan for implementation by way of Order of the above Honourable Court;
4. That an appropriate cost order be issued, taking into consideration all relevant circumstances”.

Furthermore, provision was made in the order for dealing with any deadlock which might arise during the therapeutic process by way of arbitration.

It is common cause that these ‘therapeutic sessions’ with the parties and the children on the one hand and the psychologist on the other hardly got off the ground when it came to a halt because of reservations on the part of the children to participate any further. It is further alleged that the first respondent also did not see any use in attending further sessions.

This brought into play the prospects the matter being arbitrated by Advocate Gajjar. According to his report he could not embark on such process for lack of co-operation between the parties as well as the children.

This in turn lead to the application being resurrected for consideration of the relief in Part B because if the therapeutic sessions and / or arbitration achieved the aims of the application, it would hardly serve any purpose in resorting to Part 'B'.

In the meantime, the second respondent, Advocate Elizabeth Course, was appointed curator ad litem to represent the two minor children and to take care of their interests in this matter.

It seems that the first respondent has placed a few factual allegations made by the applicant in dispute. Furthermore, the second respondent has contested the legal competency of the relief sought and/or the wisdom thereof.

In addition, the first respondent has placed in dispute the opinions of Dr Gillian Smale by filing contrary expert opinions authored by Dr Stigent and Miss Cawood respectively.

Because I was informed of the nature of the specific disputes and in view of the manner in which this application to refer issues to oral evidence was argued on behalf of the applicant, it is clear that it is based purely on the dispute(s) which arise from the written opinions of the experts primarily in regard to the existence of a parental alienation syndrome.

It seems that the applicant is satisfied that the other disputes can be dealt with on the papers. I will therefore confine myself the issue(s) material to the application for referral. This application is merely a small cog in the history of this matter which clearly demonstrates a conflict between the applicant and first respondent. It is clear that the conflict between them, either verbal or otherwise, is now manifesting and playing itself out. While there may be other issues involved, it touches the minor children.

It is trite that in this type of application (and any other relevant or related procedure) the interests of the minor children surges above all else. While there might be other issues including the rights of the parties, the interests of the children need to be protected and are likely to be preferred against any other interest especially if, in upholding a contesting interest, the interests of the children would be negatively affected.

In order to determine this application it is necessary for me to consider the history of the matter and indeed the facts material thereto especially those which would assist in deciding this application. It must not be construed that in doing so, I am making findings on the main issues and perhaps making a determination in regard to Part 'B'. It must be understood any such findings I do make, is essentially for the purposes of this specific application.

As will be seen in this judgement, I have deliberately dealt with the specific reports of all the experts as briefly as circumstances would allow so as to avoid any impression that I have made findings which touch the main application.

Dr Stigent has had contact with the said minor children for a few years now and it seems that he came into contact with them precisely because of their refusal to visit with their father. His dealings with them, as far as I can gauge, stretch as far back as December 2004. He reports that the children's attitude was initially somewhat puzzling especially as there was no specific reason(s) offered by either of them for adopting a negative attitude towards their father. During the course of his dealings with them, he made certain proposals and recommendations in order to promote access and therefore improvement of their relationship with their father.

By September 2007 it clear to Dr Stigent that their attitude was based on their witnessing the problematic relationship between their parents prior and during the divorce proceedings. Certain behavioural patterns about the applicant emanated from their experiences in this regard.

It also became clear to Dr Stigent that they viewed their father as over-controlling their lives during the time they spent with him in terms of the agreed access arrangements eg. He did not keep his promises, prevented them from seeing their friends during that time, he displayed unpredictable moods. As Dr Stigent refers to it, the applicant's parenting style is at the heart of the problem. He lastly reports that

the children themselves indicated that the resolution lies with their father and if he were 'to be cool' things would improve.

In regard to the recommendation that they be placed in interim foster care, Dr Stigent stated that this would be regarded by the children as punitive and would result in antagonising them rather than contribute to improving the situation. As I understand him, such steps would defeat the purpose for which the applicant embarked on the main process to restore his relationship with them.

He also indicated that his investigation did not disclose any evidence that the children's attitude emanated from first respondent's instigation (of parental alienation syndrome).

He took the trouble of explaining that this phenomenon of parental manipulation was at first scientifically seen as perhaps the only explanation for incidents of parental alienation. He explained however, that later investigation showed that it is not the only inference that can be drawn in such circumstances. In many cases it is the alienated parent who is the cause of the alienation and not the other party.

This coincides with this finding that the first respondent was not the cause of the alienation but rather it seemed that conduct of the applicant especially as seen by the children themselves, which is the cause thereof.

Dr Stigent's views are largely supported by that of Anne Cawood a qualified social worker practicing in Cape Town. She paid particular attention to the interests of the minor children. Having viewed the conditions at the home of the first respondent and the minor children, she was able to form an opinion on whether the children are in need of care and protection as envisaged in section 150 of the Childrens Act No 38 of 2005.

She was also of the view that the proposed displacement of the children into interim foster care would be extremely detrimental to the minor children. It follows therefore that the first respondent was not an unfit mother and/or a danger to the minor children such that they needed to be moved away from her and into foster care.

Though having consulted the children only, it is significant that she found that the children's attitude towards the applicant was based on the conduct of the applicant himself and not on that of the first respondent.

She furthermore makes the important point that ongoing litigation has exacerbated the minor children's insecurity and/or anxiety and that the sooner this ends the better for them.

Both Dr Stigent and Miss Cawood refer to comments of K that he wished this would all 'go away'.

Gillian Smale and Gillian van der Riet were appointed as clinical psychologists to deal with the attempts to pave the way to restore the relationship between the applicant and the minor children. They dealt with Advocate Marisa du Toit, who represented the family advocate in the area. They were guided by the court order of 16 October 2007 in terms of which certain formulated procedures were to be followed in order to attain this restoration of the relationship in question.

In examining the letter dated 15 January 2008, which was referred to as a report by clinical psychologists Smale and Van der Riet, it appears that the children attended three individual sessions with Van der Riet alone during which they dealt with their current feelings for their father. They seemed to have discussed their reservations and frustrations with their relationship with their father and the report alludes to how this could possibly be restored.

The report does not give any details on either the reservations and frustrations or the proposed steps to be embarked upon to restore the relationship. They attended two more sessions, one with their mother, the first respondent and another without her. Again their fears about the applicant were aired.

They report that the applicant attended three separate sessions alone during which he was alerted to some of his mistakes in this regard and how he may have himself contributed to being alienated. Again no details in this regard appear in the report.

The applicant and first respondent then for some reason entered into a written contract arranged by the psychologists, undertaking to limit question about the children and to answer the same respectively. This communication would occur electronically through what is commonly known as e-mails. The 'contract' also included details of the applicant making enquiries about the children's scholastic progress from their school and the first respondent undertook not to obstruct this.

The psychologists then felt that it was necessary to enhance a 'togetherness' with the parties and children by bringing them together and work out a way forward.

This did not work and lead the psychologists to believe that the continuation of this process would only worsen matters. The new regime caused further problems and the psychologists concede that they were unable to attain the aims of the process and that they had reached a stalemate.

They then go on to describe the willingness or otherwise of or the parties to contribute to the unsuccessful process. By and large they report the total co-

operation in the process by the applicant. They go on to describe the first respondent as having failed to ensure the success of the process in many respects.

Their statement that, 'it has become apparent that the coalition between the first respondent and the children puts their father in an impossible no-win situation' and results in the frustration of his attempts to do the right thing. Amidst their various assertions in this regard the only one which could be regarded as having some substance is first respondent's 'irrational fear' by stating in front of the boys that 'she would not dare to sit in the same room as Andr   (the applicant). This together with other factors seem to be the basis for their "conclusion that the 'boys disrespect' their father and the erroneous belief that Andr   does not have a right to be part of 'their lives' is reinforced by her conduct". I might point out that in this regard, their report that first respondent stated her fears for the applicant while in the presence of the minor children, (my underlining) is the only possible contribution by her to the children's attitude towards the applicant.

All the other examples which the psychologists rely on for their conclusion are matters which they could only have sourced from the applicant and is void of any independent substantiation or obvious corroboration. That the first respondent has given the bare minimum of a response to enquiry and sometimes been facetious appears to be judgmental and absent detail thereof, begs the question as to the standards by which such conclusions are made. Eg. Whether her 'fear' is 'irrational' or not, that the minor children 'disrespect' the applicant and the 'erroneous' belief that the applicant has no right to be part of their lives.

Similarly, that she states in the presence of the children that she would not dare be in the same room with the applicant does not necessarily mean that this resulted in the boy's disrespect for the applicant. Indeed throughout all the reports there is no evidence that the boys disrespect the applicant.

It seems to me that all this report signifies is that the process they were involved in has come to an end. All the other assertions therein are either baseless or of no moment.

Dr Gillian Smale submitted a further letter in the form of a report suggesting further therapeutic processes in the matter. In brief it suggests a removal of the children from the first respondent and to place them in a position of 'neutrality' with interim custodial parents in order that they be 'released' from being influenced.

The suggested benefits thereof are: (a) the children would be removed from a situation which demands demonstration of loyalty or solidarity with one parent; (b) have an opportunity to experience emotional containment, appropriate limits and discipline while developing a level of respect and responsibility - all qualities that the first respondent was not able to provide; (c) first respondent could then work through her own crisis which emerge from her divorce.

A family re-integration plan is then suggested. I do not purpose to repeat all of the ten suggestions save to say that they put extremely huge responsibilities on the young shoulders of these children to do certain things which are clearly intended to counteract their present attitude towards the applicant. This would entail mechanisms which, to say the least, strain their constitutional rights to, inter alia, dignity (section 10), and their section 27 and section 28 rights as embodied in Chapter 2 of the Constitution of the Republic of South Africa, Act 108 of 1996 ('the Constitution').

Furthermore section 150 of the Children's Act No 38 of 2005 ('the Act') allows for children to be removed to foster care (I assume either interim and permanently) under very stringent conditions prescribed in this act. In my view the minor childrens' conditions do not comply with the conditions envisaged in the act so as to justify their removal.

A substantial part of this programme was suggested by the applicant's legal representative to the first respondent's representative in a letter dated 31 July 2008. The suggested programme is prefaced by an assertion that application will be made for the minor children to be placed in interim foster care as envisaged in Part B of the relief set out in the notice of motion.

The second respondent has submitted her well prepared report. She consulted separately with the children, applicant and first respondent. These consultations were in depth and directed at the issues relevant to the main application.

It is not necessary, for the purposes of this particular application, to repeat the content of her consultation and accumulation of information. I will return to her opinion and recommendation presently.

The family advocate, Marisa du Toit, also submitted a short report. Attached thereto is a report by social worker, Helena Elizabeth Retief. The reason for the Retief report was occasioned by the fact that the family advocate (du Toit) had previously dealt with the matter and was involved in a court order emanating from her involvement. She did not think it proper to be personally involved on this occasion.

The Retief report also refers to a consultations with the minor children and explained that she had telephonic discussions about the matter with both applicant and first respondent. She confirms the fragile relationship between the applicant and first respondent. She also confirms the extremely negative relationship between the applicant and the minor children.

The opinion of the curator-ad-litem is that the root of the problem is the 'problem filled' relationship between the applicant and first respondent. It is this that is

affecting the relationship between the applicant and the children. She also considered the Children's Act No 38 of 2005 in assessing the position. I will deal therewith presently.

In her view the children are comfortable with the first respondent and does not recommend uprooting the children from their stable existence. She categorically states that it is in the best interests of the minor children that this does not happen.

Social worker Retief, from whom Smale and Van der Riet obtained information or took instructions in regard to their investigation also found the suggested intervention of removing the children to foster care, inappropriate and significantly rejected the idea.

Mr Goosen, who appeared for the applicant conceded that the ultimate relief sought is unusual. He informed me that so unusual is that relief sought that he has been unable to find authority to support it.

The suggested process which is the primary relief sought entails the removal of the minor children from their mother, the first respondent, so as to 'cleanse' the minds of the children from her alleged influences.

I would prefer not to comment on the suggested procedure to be adopted if they are so removed save to say that it would seem to me that this would strain the minor children's constitutional rights.

It might be prudent to mention that Dr Smale contends that the procedure is not intended to be punitive. (my underlining) Dr Stigent and Cawood argue that this would be harmful and would be seen as punitive by the minor children. While this controversial procedure forms the basis of disputed views as between the experts, it is significantly not an issue that is sought to be referred for evidence.

Chapter 9 of the Children's Act No 38 of 2005 ("the Act") prescribe procedures under which children in need of care and protection may be removed from their prevailing circumstances and placed appropriately. The second respondent has argued that the case of the minor children in question is not one which invokes the Act. This is supported by Cawood and Retief.

Without wanting to explore the application of the act or otherwise there is no allegation that the first respondent is causing any danger to the children so that they need to be protected from her.

In my view, the applicant's claim is based, on the notion that the minor children is in need of fatherly guidance or presumably, that this is essential for their well being.

He claims that it is therefore important that his relationship with them is restored and that this is being frustrated by the first respondent.

It is this aspect which forms the cornerstone of this application in terms of Rule 6(5) (g) and which application is normally granted when it is found that the 'clearly defined issues in dispute are comparatively simple' and that it would be convenient for the speedy determination thereof is desirable. The rule provides for oral evidence to be heard on certain germane issues. It was not designed to determine issues of fact which give rise to further enquiry into other real and substantial issues of fact nor is it to be used to open the door to enquiry of any other issues. The court hearing the application has a discretion to grant it. This discretion, though extensive, is not unlimited, as the evidence should be confined to the specific issues. See: *Pressema Services (Pty) Ltd v Schuttler & Another* 1990(2)SA 411(c) at 419 E-G; *Trust Bank van Afrika Bpk v Western Bank Bpk en andere NNO* 1978(4)SA 281(A) at 303- G-G.

From the nature of the proposed enquiry by way of oral evidence, it is clear that the dispute involves the question as to whether first respondent has orchestrated or contributed in any way to the present situation in which the relationship between applicant and the minor children can at best be described as precarious.

I might add that the assertion that the first respondent might have anything to do with the situation is clearly based on assumptions made by the applicant and carried over

to Dr Smale and Van der Riet. There is nothing to substantiate these assumptions and assertions even less, evidence to suggest this.

The only aspect which could be construed as carrying some weight is her statement that she would not be in the same room with the applicant. She said this in the presence of the children and it is this that is heavily relied upon for concluding that she contributes to the children's disrespect for the applicant. The report does not describe the circumstances in which she said so. What is clear is that she referred to herself and not the children. She is entitled to choose her company. It is difficult, from the report itself, to follow how this statement leads to or contributes to any disrespect the children might show towards the applicant.

In addition, the evidence that both the minor children have stated that they have reservations about being with the applicant is undisputed. They even went as far as to say what possible solution to the impasse would be acceptable and would lead to a resolution thereof.

The minor children are not babies. They both can and indeed clearly do think for themselves. They would be justified in feeling insulted if forced into a situation in which they are treated in the way prescribed by the recommended regime.

It seems to me that the purpose of this application is therefore baseless because all that such oral evidence would establish is whether the first respondent is responsible to any extent, for the said impasse in the relationship between the applicant and the children.

This brings me to the impact that such evidence would have on the main application.

Assuming that first respondent is directly responsible for the situation complained of. The fact of the matter is that it is the prevailing situation as between the children and applicant. The question then remains as to what happens next. The relief sought suggest the imposition of the recommended process.

The suggested process sought to be put into operation by order of court would, in my view, be contrary to the act and the constitution. It would clearly cause more harm to an already fragile relationship. The details of the proposed regime would seriously strain the children's rights under sections under chapter 2 of the Constitution. It would also strain the import of quite a few international legal instruments and policies regarding children's rights.

It is noteworthy that Smale insisted that the proposed regime was not intended (my underlining) to be punitive. While it might not have been intended to be so, the undisputed findings of both Dr Stigent and Cawood are that it would be regarded as

punitive by the children. In my view the effect thereof would in the light of the recent attitude of the minor children towards the applicant, amount to punitive measures particularly in view of the nature and detail of the regime in which the reward system becomes quite apparent.

The probabilities of such a regime being approved of by order of court is minimal to say the least.

Furthermore, referring these issues for evidence would establish the role of the first respondent in this impasse in the relationship between the minor children and the applicant. At most it would prove that she is solely responsible for manipulating the minds of the minor children in this regard.

In my view that would, in any event, not justify the imposition of the proposed regime especially in the light of the solution to the impasse clearly being suggested by the children themselves.

Referring the issues to oral evidence would serve no purpose in the circumstances and would indeed extend the proceedings instead of curtailing it as Rule 6(5)g seeks to do. The application for the referral of these issues to oral evidence therefore falls to be dismissed.

As to costs, it would seem to me that the applicant could not necessarily have foreseen the result of this application. It is also one which was launched as a means to attempt to clear an apparent dispute brought about by the opinions of the respective experts. I think it would be fair to say that the applicant was justified in thinking that the dispute in question should be clarified especially in the light of the expert reports of psychologists appointed by order of court. In the circumstances it would seem to me to be fair to order that the costs hereof be regarded as costs in the cause.

In the result,

- (iii) The application in terms of Rule 6(5) (g) is dismissed.
- (iv) Costs hereof are to be costs in the cause.

PILLAY J.

JUDGE OF THE HIGH COURT