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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case No: 3350/2022

In the matter between:

H[...] S[...] E[]

Applicant

And

H[...] A[...] E[]

Respondent

Neutral citation: *HSE v HAE (3350/2022)*

Coram: Daniso, J

Heard: 10 October 2024

Delivered: 26 February 2025

ORDER

(1) The application is dismissed.

(2) The applicant shall pay the respondent's costs on attorney and client scale including the costs of counsel.

JUDGMENT

Daniso, J

[1] This is an opposed application (main application) for the variation of the primary residence, care and contact order made pursuant to the parties' divorce on 2 May 2017 (the divorce order), incorporating a settlement agreement concluded between the parties.

[2] In terms of the settlement agreement, the parties agreed that primary residence and care of the parties' two minor children, girls H[...] presently 10 years old and H[...] 9 years old was awarded to the respondent subject to the applicant's right to have reasonable contact at all reasonable times namely: to take the minor children with him every alternate weekend on Friday from 12h30 to Sunday 17h00; every alternate short holiday and half of each long school holiday including reasonable telephonic access. The applicant was ordered to pay maintenance to the respondent in respect of the minor children in the amount of R4000.00 per month per child.

[3] The main application is premised on the grounds that the respondent is not a suitable custodian for the minor children. She has systematically embarked on a calculated campaign to alienate the minor children from the applicant therefore, it would be in the best interests of the minor children that they reside with him. The relief is thus sought on the following terms:

"1. That, subject to prayer 3 (3.1 – 3.4) below, the primary place of residence of the minor children be awarded to the Applicant in terms of Section 23 of the Children's Act 38 of 2005.

2. That, subject to prayer 3 (3.1 – 3.4) below, the following rights of contact with the minor children be awarded to the Respondent in terms of section 18(2)(b) of the Children's Act 38 of 2005:

2.1 The right to have contact with the minor children every alternating weekend from Friday at 14h00 until Sunday at 17h00;

2.2 The right to have contact with the minor children every alternating school holiday, with the long school holidays being divided equally between the parties, as well as contact with the minor children every alternating Christmas;

2.3 The right to have contact with the minor children on Mother's Day from 09h00 until 17h00, in the event that Mother's Day does not occur during a normal contact weekend;

2.4 Reasonable audio-visual and telephonic contact at all reasonable times;

3. That prayers 1 and 2 above shall be subject to the following:

3.1. That Dr Nellie Prinsloo, alternatively a registered clinical or educational psychologist to be agreed upon by the parties or, if no agreement can be reached, to be appointed by this Honourable Court, be appointed to introduce the minor children into the care of the Applicant as soon as reasonably practicable;

3.2. That prayers 1 and 2 above be suspended, and the current care and contact arrangements in respect of the minor children stay in place until such a time as the person appointed in terms of prayer 3.1 above is satisfied that the minor children are ready to relocate to the residence of the Applicant;

3.3. *That the person appointed in terms of prayer 3.1 above be ordered to inform both parties as well as the Office of the Family Advocate in writing that:*

3.3.1. *s/he is satisfied that the minor children are ready to relocate to the residence of the Applicant;*

3.3.2. *the date upon which prayers 1 and 2 above are to be implemented; and*

3.3.3. *and the manner in which the relocation will take place in accordance with the best interests of the minor children;*

3.4. *That the determinations contemplated in prayers 3.3 (3.3.1-3.3.2) above shall be final and binding on the parties;*

3.5. *That the costs of the person appointed in terms of prayer 3.1 above be paid jointly by the parties;*

4. *That once prayers 1 and 2 above are implemented in accordance with prayer 3 (3.1 - 3.4) above:*

4.1. *the minor children shall receive therapy to aid their adaptation and to monitor their progress;*

4.2. *the minor children shall be psychologically evaluated by the person appointed in terms of prayer 3.1 above once every 18 months or such shorter period as the court may determine to be necessary;*

4.3. *the costs incurred in respect of prayers 4.1 and 4.2 above be paid jointly by the parties;*

5. *That the Respondent be referred to psychological counselling by a registered clinical psychologist as well as attend parental guidance sessions to assist her to act in the best interest of the minor children;*

6. *That the Applicant be referred for regular parental guidance at a clinical or education psychologist to assist him to raise the minor children to the best of his abilities;*

7. *No order as to costs, save in the event of the Respondent opposing the matter...*

[4] In his founding affidavit, the applicant relies on the report by a clinical Psychologist Ms Nellie Prinsloo (Prinsloo's report) dated 21 September 2021. The report was obtained by agreement between the parties pursuant to the opposed urgent application launched by the applicant during April 2021 on the grounds that he had observed "a dramatic change in the children's behaviour, they had become withdrawn, displayed extreme social anxiety and anti-social behaviour' and a reluctance to engage with their peers." Prinsloo recommended that it would be in the best interests of the children that they reside with the applicant "as soon as possible."

[5] Following Prinsloo's recommendations, the applicant launched another urgent application in this court on 13 October 2021 under case number 4624/2021 for the implementation of Prinsloo's recommendations that primary residency of the minor children be awarded to him. The application was struck from roll due to lack of urgency, the applicant was granted leave to re-enrol the application on the unopposed roll instead, he withdrew the application.

[6] Prinsloo's report is still what brings the applicant to this court over a year later after he withdrew the previous application for primary residency. The salient parts of Prinsloo's report are the following: "there are definite signs that the respondent has

been steadfastly alienating the children” from the applicant and this is based on the fact that after she served the applicant with divorce papers she instituted a supervised visitation without a recommendation from a professional; then she increased the minor children’s weekend visits to the applicant but then wanted reduce them; asked the minor children to refer to their maternal grandmother as “Dad” and told them the applicant was naughty and dangerous. During the consultation, the respondent informed her (Prinsloo) that if the children did not want to visit the applicant, she cannot force them.

[7] It is the applicant’s case that this application is intended to protect the minor children from the respondent’s insidious campaign of parental alienation which has been ongoing since she served him with the divorce papers. He states that, the respondent has persisted with her behaviour laying countless false and vexatious allegations against him including seeking an assessment regarding sexual abuse or ill-treatment of the minor children all in the attempt to frustrate his contact rights. She is unwilling and unable to change her behaviour. The applicant avers that it is undisputed that separating the children from the respondent will cause them emotional distress but according to Prinsloo, if they reside with the applicant that would avoid long-term damage resulting from parental alienation by the respondent.

[8] In addition to opposing the main application, the respondent raised a counter-application seeking inter alia, the referral of the matter to the family advocate for an investigation and a report in relation to the best interests of the children pertaining to the relief sought by the applicant and the stay of the main application pending the outcome of the family advocate’s investigation. The respondent also sought a rule nisi (the contempt application) for the applicant to give reasons why he should not be found guilty of disobeying the order to pay maintenance in respect of the minor children and the cost order in terms of which he was ordered to reimburse the respondent for the costs she incurred in launching an urgent application for the return of the minor children to her care in March 2020 and for opposing the applicant’s abortive urgent application launched a year later in October 2021 seeking the same relief he seeks in these current proceedings.

[9] As regards the main application, the respondent denies parental alienation and avers that prior to the finalization of the divorce proceedings the parties concluded a settlement agreement in terms of which the parties agreed that the respondent be awarded primary residence and care of the minor children. At no stage did the applicant complain about his contact rights being curtailed. The settlement agreement was endorsed by the family advocate on 21 June 2016. Contrary to the applicant's allegations, he has exercised his contact rights in terms of the divorce order since the dissolution of their marriage without raising any complaints in fact, in March 2020 she had to launch an urgent application for the return of the minor children after the applicant breached the terms of the divorce order by refusing to return the minor children to her care. The applicant was ordered to pay the costs of that application. A year later in October 2021, he launched an urgent application seeking to be awarded primary residency of the children. The application was struck from the roll due to lack of urgency and he was ordered to pay the respondent's costs.

[10] It is the respondent's case that the applicant's allegations of parental alienation are not founded on any evidence in that, he relies on Prinsloo's report which has no evidential value as it is outdated. Furthermore, the report does not comply with the peremptory requirements of section 7 of the Act for the determination of what would be in the best interests of the minor children in that the views of the minor children regarding the change of primary residence were not considered and the social worker's report compiled by Ms Heidi Joubert dated 29 June 2017 before Prinsloo's investigation has also not been taken into account. The respondent points out that Ms Joubert did not confirm the applicant's allegations of parental alienation, instead, she recommended that the respondent was to remain vested with the minor children's primary residency as per the initial family advocate's report endorsing the settlement agreement concluded by the parties in this respect.¹

¹ The family advocate's report was issued on 21 June 2016. It was accompanied by the family counsellor's report dated 30 May 2016.

[11] The respondent disputes that the change of primary residency will serve the minor children's best interests. She states that the applicant has been remiss of complying with his parental responsibilities by failing to pay maintenance. Furthermore, awarding him primary residency will subject the minor children to living in isolation as he intends to home school them solely to promote his beliefs in racial segregation. The applicant resides in Springfontein in the district of Britstown situated in Northern Cape province whilst the respondent and the minor children reside in Brandfort during the week and spend weekends in Bloemfontein, both towns are in Free State province. Awarding the applicant primary residency of the minor children will curtail her parental rights as it would be impractical and expensive for her to maintain regular contact with the minor children based on her meagre income. She submits that Prinsloo also concedes that the change in primary residency will cause emotional distress and trauma for the minor the children. In her care, the minor children are thriving, doing exceedingly well in school where they are also participating in school activities and are happy and enjoy where they presently live. Her job (raising wild cats) allows her flexibility to look after the children, to help with school and extra mural activities and to spend quality time with them based on all these reasons, the main application ought to be dismissed with costs.

[12] The main application and the respondent's counter-application served before me on 20 and 28 April 2023 and having considered the matter, I upheld part of the respondent's counter-application by granting an order that the family advocate investigates the circumstances of the minor children and provide a report and recommendations in relation to their best interests pertaining to the relief sought by the applicant, the main application was stayed pending receipt of the family advocate's report and the parties were granted leave to supplement their papers upon receipt of the family advocate's report. As regards the contempt application, judgment was delivered on 15 August 2023. The application was also determined in favour of the respondent on the basis that a rule nisi was issued for the applicant to give reasons why he should not be found guilty of failing to pay maintenance in the sum of R268 635. 35 and the respondent's legal costs in the amount of R166 659.29 and be ordered to pay a fine or

be sentenced to imprisonment for a period of six (6) months. The rule nisi was eventually confirmed by Zietsman, AJ on 25 April 2024.

[13] In terms of section 7 and 9 of the Children's Act (the Act)² read with section 28 of the Constitution the best interests of a child are of paramount consideration when the court decides every matter concerning a child including a child's primary residence, care and contact.³

[14] The report and recommendations of the family advocate were received on 16 August 2023. The report indicates that in addition to the assessment of the entire family, the minor children's views were obtained during the assessments which were carried out separately from each other and in the absence of their parents and neither of them have a concern on how the current contact is exercised with their father. They are both positive and happy to live with the mother and attend school in Brandfort. They do not experience that their contact is frustrated by the mother. They are aware that their parents do not get along however the respondent does not speak ill of the applicant in fact, she tells them that he is a good Dad. With regard to telephonic contact, the applicant calls them on the respondents' phone about three times a week in the evenings and when they ask the respondent to call the applicant, the respondent allows them. They also confirm that their parents share the school holidays and they rotate between them.

[15] The minor children also informed the family advocate that they relate to both of the parents very well, they love both of them and they miss the applicant when they are with the respondent and also miss the respondent when they are with the applicant.

[16] According to the family advocate, H[...]s emotional functioning and behavioural challenges at school are attributable to the divorce not the respondent's alleged

² Children's Act 38 of 2005.

³ *Fletcher v Fletcher* **1948 (1) SA 130 (AD)** at 144; *McCall v McCall* **1994 (3) SA 201** (C) at 205 paras A-M.

parental alienation strategies. Based on all these reasons, the family advocate recommends that it would be in the best interests of the minor children that their daily care and residence remains with the respondent and the applicant retains his contact rights. Additional recommendations were made relating to appointment of experts to assist the parents with contact aspects and parental communication and the minor children with psychotherapy which will also address the minor children's emotional functioning including H[...]’s behavioural challenges. With regard to Prinsloo’s psychological assessments and findings, the family advocate states that they are outdated therefore no weight can be placed on them.

[17] It is trite that the custodian parent enjoys the power to regulate the minor child’s life, including where it lives and attends school. The court as upper guardian of the minor child will only interfere with that power on good cause shown that the power is being abused and is not being exercised in a way that is in the child’s best interests. The onus is on the applicant to satisfy the court on a balance of probabilities that good cause exists for the variation of the subsisting primary residence and care order and that the variation would be in the best and true interests of the minor children.⁴

[18] I am not so satisfied. The insistence of the applicant to rely on Prinsloo’s recycled report whilst conceding that it is outdated is unsound. Despite its age, the examination of Prinsloo’s report reveals that the views of the minor children were not addressed with regard to the relief sought by the applicant and in terms of section 10 of the Act, in any matter concerning the children their views must be given due consideration. That aside, on the available facts the applicant’s allegations that the respondent began her parental alienating campaign soon after she served him with the divorce papers cannot be true as the divorce order incorporated a settlement agreement in terms of which, the applicant agreed that the respondent be awarded primary residence of the minor children. It does not end there, the settlement agreement was endorsed by the family advocate on June 2016, a year before the divorce order was granted therefore, the

⁴ *Edge v Murray*, **1962 (3) SA 603** (W) at 606 A-E; *Van Oudenhove v Gruber* **1981 (4) SA 857** (A) at 868B.

applicant's allegations including Prinsloo's findings regarding the respondent's parental alienation are clearly not based on legitimate facts. It was pointed out in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH*⁵ that:

“an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness.”

[19] The allegations are also dispelled by the minor children in the family advocate's report which in my view, reveals that a meticulous assessment regarding the best interests of the minor children in relation to their primary residence was carried out. I am inclined to accept its probative value and veracity with regard to the disputed allegations involving the minor children's care. The report also presents the minor children's views which play a significant role when the court considers the best interests of the children.⁶

[20] The applicant's criticism of the family advocate's report essentially on the grounds that neither the family advocate nor the family counsellor in the family advocate's office are properly qualified to refute Prinsloo's findings⁷ is in my view, simply frivolous. Section 29(5)(a) of the Act permits a family advocate, a social worker or other suitably qualified person to assist the court with investigations and reports for the purpose of the hearing of matters involving children. I have also not detected any bias towards the respondent or “lack of objectivity” in the family advocate's report.

[21] Having viewed all the available factors conjunctively, I am not persuaded that the applicant has adduced sufficient evidence to prove that the change of primary residence and care would be in the best interests of the minor children on a balance of probabilities. The application ought to fail.

⁵ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* **1976 (3) SA 352** (A) at 371F-H.

⁶ See s10 of the Act.

⁷ Applicant's supplementary affidavit, para 3-9.

Costs

[22] The respondent submits that the applicant has persistently pursued the relief he seeks herein on spurious grounds and in the face of incontrovertible evidence and findings and recommendations of the family advocate therefore, he must be ordered to pay the respondent's costs on a punitive scale.

[23] I am convinced that this application was not intended to protect the minor children's best interests. On the available facts, the applicant is not the better protector of the minor children's best interests. He has already been found guilty of disobeying a court order to pay maintenance and a parent's disregard of a court order to maintain a child is prejudicial to the best interests of a child.⁸ Nonetheless, he has been unrelentingly subjected the respondent to repetitive and frivolous litigations based on similar facts. I am thus satisfied that a punitive cost order is warranted in these circumstances. I make the following order:

Order

(1) The application is dismissed.

(2) The applicant shall pay the respondent's costs on attorney and client scale including the costs of counsel.

N S DANISO, J

APPEARANCES

Counsel on behalf of the applicant:

Adv H J Van Der Merwe

Instructed by:

Symington De Kok Attorneys

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⁸ *Bannatyne v Bannatyne and Another* CCT18/02 [2002] ZACC 31; 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) (20 December 2002).

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