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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case number: **8947/2022P**

In the matter between:

D[...] R[...] R[...]

APPLICANT

and

S[...] D[...] R[...]

FIRST RESPONDENT

THE OFFICE OF THE FAMILY ADVOCATE

SECOND RESPONDENT

Coram: Mossop J

Heard: 10, 11, 12 February 2025

Written argument delivered on: 20 February 2025

Judgement delivered: 13 March 2025

ORDER

The following order is granted:

Primary care of S and M

1. Primary care of S[...] D[...] R[...] (S), a boy born on 5 May 2017, and M[...] R[...] (M), a girl born on 21 September 2021, is awarded to the first respondent and both children shall have their primary place of residence with the first respondent.

Contact by the applicant with S

2. The applicant shall be entitled to exercise contact with the minor child S as follows:

(a) where possible, and only following prior confirmation by the applicant with the first respondent at least 72 hours prior to the intended visit, on the second and fourth weekends of every month commencing on Friday afternoon at 14h00 and terminating on Sunday evening at 18h00;

(b) during the long school holidays, which are to be divided in two and shared equally between the applicant and the first respondent; and

(c) during the short school holidays, which are to be alternated between the applicant and the first respondent.

3. In addition to the abovementioned contact, the applicant shall be entitled to reasonable telephone and video contact with S on a daily basis by arrangement with the first respondent.

Contact by the applicant with M

4. The applicant shall be entitled to exercise contact with the minor child M where possible, and only following prior confirmation by the applicant with the first respondent at least 72 hours prior to the intended visit, on the second and fourth weekends of every month.

5. Such contact shall be exercised as follows until M reaches school going age:

(a) commencing on Friday afternoon at 14h00 and terminating at 18h00 on Friday evening;

(b) commencing on Saturday morning at 09h00 and terminating on Saturday evening at 18h00; and

(c) commencing on Sunday morning at 09h00 and terminating on Sunday evening at 18h00; and

6. In addition to the abovementioned contact, the applicant shall be entitled to reasonable telephone and video contact with M on a daily basis by arrangement with the first respondent.

7. Upon M attaining school going age, the parties, or any one of them, shall be entitled to seek the variation of the order relating to the first applicant's contact with M.

Costs

8. There shall be no order as to costs.

JUDGMENT

MOSSOP J:

[1] The applicant and the first respondent are married to each other, and they have two children. Their eldest child is a boy, S[...] D[...] R[...], who I shall refer to as 'S', who was born on 5 May 2017, and they also have a daughter, M[...] R[...], who I shall refer to as 'M', who was born on 21 September 2021.¹

[2] The applicant and the first respondent do not live together. The applicant presently lives in Johannesburg and the first respondent lives in Pietermaritzburg. Their separation from each other was not intended to be permanent but it has become so. They had previously both lived in Pietermaritzburg, but agreed that the applicant would move to Johannesburg, taking S with him, with a view to securing employment there for himself and that the first respondent would then follow later with M. In Johannesburg, they would reconstitute themselves as a family and all live together.

[3] That plan never came to fruition. The first respondent decided that she would not move to Johannesburg after the applicant and S had already moved there. The applicant, however, chose not to return to Pietermaritzburg when he received that news, but remained in Johannesburg with S. Thus, for the past three years, the two children born of their marriage have remained separated from each other: M with her mother and S with his father.

[4] Apparently not content with this arrangement, the applicant brought an application in which he sought an order that he be awarded care of both children. That relief was opposed by the first respondent. It was evident from the papers filed that there were irresolvable disputes of fact.

The referral to trial

¹ At the time of the trial to which reference is later made, S was thus two months away from his eighth birthday and M was three and a half years old.

[5] As a consequence, Sibiya J granted the following order on 27 September 2022:

‘1. The matter is referred to trial for the hearing of oral evidence in order for the court to consider and give a ruling on the following issues:

1.1 Which of the parties (the Applicant or the First Respondent) should the minor child S, a boy born of the union between the Applicant and First Respondent on 5 May 2017 (S) have his primary place of residence with (“S’s custodial parent”);

1.2 What terms of contact should the party with whom S does not primarily reside (S’s non- custodial parent) enjoy with regard to S?

1.3 Which of the parties (the Applicant or the First Respondent) should the minor child, M, a girl born of the union between the parties on 21 September 2021 (“M”) have her primary place of residence with (M’s custodial parent);

1.4 What terms of contact should the party with whom M does not primarily reside (M’s non-custodial parent) enjoy with regard to M;

1.5 Should S and M be separated and have different custodial parents.’

[6] The order is clumsily worded, but its meaning is reasonably clear.

The facts

[7] The trial contemplated by the order of Sibiya J came before me.

[8] It was common cause that in the past, the applicant had suffered from a serious drug addiction. The first respondent was not herself blemish-free as regards the use of substances: it was not disputed that she had consumed alcohol and had used dagga at

one stage. While the applicant's drug addiction had worsened and had led him to use increasingly more addictive substances, including benzodiazepine, 'whoonga',² heroin and crack cocaine, the first respondent's own substance use did not escalate, and she did not follow him down the slippery road to harder drug use. Due to his addiction, the applicant was twice admitted to treatment centres in an attempt to rid him of his dependency.

[9] The applicant was trained to be a graphic designer but apparently found it difficult to secure quality employment in this field in Pietermaritzburg. The relationship between him and the first respondent was always volatile and the parties frequently split up and went their separate ways, only for their separate orbits to later intersect and for their relationship to resume. During the course of this fractious relationship, they married, and the two minor children were conceived and born.

[10] At a stage when the marriage was on a relatively stable trajectory, the applicant and first respondent agreed that it would be best for them to move to Johannesburg so that the applicant could seek employment, both believing that the opportunities for work would be more plentiful for him there. The move was also prompted by the fact that the applicant's mother, with whom he was particularly close, had moved to Johannesburg after being diagnosed with cancer. The first respondent, who apparently had no difficulty in securing employment, intended to follow the applicant once her obligations to her then-employer had been finalised. It was agreed that the applicant would take S with him and that M would remain with the first respondent until she and M both relocated to Johannesburg.

[11] During December 2021, the applicant accordingly relocated with S to the residence of his older sister, Ms L[...] G[...] (Ms G), in Johannesburg. There they remain to this day. The applicant did not obtain employment for a period of some 15 months after arriving in Johannesburg. How he sustained himself over this period will be considered shortly. His younger sister also resides in Johannesburg and is a teacher at

² Apparently, a mixture of heroin and other substances.

a local Montessori school and S was duly enrolled at that school. How this was paid for will also be considered shortly.

[12] The dream of a common residence in Johannesburg was dashed one weekend in July 2022. The first respondent's family had hired a holiday house for a weekend on the KwaZulu-Natal north coast to accommodate a family getaway. The applicant travelled down from Johannesburg with S to join them there. During the course of that weekend, the first respondent, correctly or incorrectly, formed the view that the applicant was still using drugs. The applicant denies this to be true, and it may well not be true, but what cannot be denied is that the first respondent believed this to be the case. She consequently told the applicant that she would not be joining him in Johannesburg and that the marriage was over.

[13] The first respondent thereafter attempted to prevent S from returning with the applicant to Johannesburg and that led to an application to the High Court in Pietermaritzburg, which, coincidentally, served before me on 18 July 2022. I granted an order with interim relief that S be permitted to return to Johannesburg with the applicant. I also requested the second respondent, the Office of the Family Advocate, to investigate the matter and to prepare a report.

The oral evidence called by the applicant at trial

[14] The applicant called as witnesses a social worker, an expert clinical psychologist and his older sister, Ms G. He also gave evidence. All this evidence needs to be considered and evaluated.

[15] The social worker, Ms Felecia Buthelezi (Ms Buthelezi), testified that she had visited two places where the first respondent claimed to live, at the request of the clinical psychologist in Johannesburg instructed by the applicant. The place that she visited first was a studio flat in a block of flats, but it rapidly emerged that the first respondent did not actually reside there but, in fact, resided at her parents' home. That

home was a free-standing house set in a garden. There were, according to Ms Buthelezi, apparently fierce dogs at the home and she described the numerous trees in the garden of that home as being 'scary'. I have no idea at all what she meant by that. The use of that adjective, perhaps, tells us more about Ms Buthelezi than about the trees. Or the garden. Ms Buthelezi's evidence was tendered only in relation to the suitability of the first respondent's accommodation.

[16] The clinical psychologist called by the applicant was Ms Megan Main-Baillie (Ms Main-Baillie). Ms Main-Baillie has her practice in Johannesburg and is the person who instructed Ms Buthelezi.

[17] Ms Main-Baillie prepared a report, which was received by the court, in which she set out the scope of her investigations, the interviews that she conducted, the analysis that she performed on the facts that she discovered, and the conclusions to which she came. Her report was in excess of 100 pages. Leaping ahead to the conclusion of her report, she found as follows:

'M and S should primarily side with [the applicant], with frequent contact from [the first respondent], where practical, which will give each parent an opportunity to work on their connection with their children.

Ideally, should [the applicant and the first respondent] decide to reside in the same province then the children should have far more regular contact with [the first respondent]. There appears to be no compelling reason why either parent cannot relocate as neither have work commitments in the province in which they reside. However, of the residences visited during the evaluation process, the [applicant's sister's] residence appears the best equipped to cater for both children's developmental needs.'

[18] Having heard and considered her evidence, I am not sure that, at the end of the day, Ms Main-Baillie added anything of value to the resolution of the issues before this

court.

[19] Firstly, the report that she prepared is dated 23 January 2023. The trial commenced on 10 February 2025. Since she had prepared her report, two years had passed and much of what was contained in her report, which may have been valid at one stage, was no longer valid. For example, in her conclusion referred to above she stated that both the applicant and the first respondent were unemployed. Factually, that statement is incorrect. Both the applicant and the first respondent are employed. There are other inaccuracies. She indicated that the applicant appeared to be drug free and referenced the results of a drug test that she required him to undergo. The result of that test was dated 19 August 2022. There is no way of knowing whether the applicant remained drug free over the period of two and half years between the date of that test and the date that the trial began. To, therefore, say at trial that the applicant was drug free, as Ms Main-Baillie did, on the strength of that single test result acquired two and a half years ago, was imprudent and unwise.

[20] It would appear that Ms Main-Baillie has had no contact with the applicant, the first respondent or the minor children for the last two years. At the very least, an updated report setting out the present circumstances of the principal personalities should have been prepared, but it was not. I heard statements en passant from the bar that there would be evidence that the first respondent had thwarted the preparation of an updated report, but I never heard this from any witness under oath.

[21] Secondly, in framing her recommendation that the care of both children be given to the applicant, Ms Main-Baillie explicitly endorsed the notion that M should be taken from the first respondent and placed in the care of the applicant. She knew full well that at the date of the commencement of the trial, the applicant had been separated from the first respondent for a period of three years. She knew, as well, that M was only three and a half years old at the date of the commencement of the trial. Thus, for virtually the whole of her life, M had only ever known the care of the first respondent, as during virtually this entire period the applicant had lived exclusively in Johannesburg. Yet, Ms

Main-Baillie recommended that M be taken away from her mother and that her care be given to the applicant.

[22] In making this recommendation, Ms Main-Baillie must surely have remembered, and taken cognisance of, her own report where she stated the following about the applicant's relationship with M:

'When he learned of M's birth, he immediately visited her daily; However, he has not had much opportunity to bond with M in the same way he bonded with S.

There is therefore a clear difference in his attachment with S compared to with M. [The applicant] clearly desires a relationship with M, as seen in his legal applications to protest [the first respondent] blocking his contact. He appeared deeply saddened when talking about his relationship with M and how much he has missed out.'

[23] Later in her report, Ms Main-Baillie remarked in a similar vein as follows:

'It appears to the undersigned psychologist in all her interactions with [the applicant], that [the applicant] deeply desires a relationship with M; however, he does not appear to have the tools to effect a long-distance relationship with her in amongst the hostile relationship he has with [the first respondent]. He appears to be passive and somewhat defeated in his attempts to form a relationship with her.'

[24] The nett effect of these observations in her report, and confirmed by Ms Main-Baillie in her evidence before me, was that the applicant did not have much of a relationship with M. Yet, Ms Main-Baillie recommended the separation of M from the first respondent, the only parent with whom she does have a bond. The logic of that approach escapes me on a human level. That conclusion became ever more questionable when Ms Main-Baillie testified before me that:

‘I think he would struggle to raise two children on their own.’

[25] An aspect of Ms Main-Baillie’s evidence with which I had no difficulty was that she agreed that siblings should, in general, be raised together. That accorded with the evidence of all the witnesses called in this matter, even the lay witnesses. This was confirmed in Ms Main-Baillie’s report where the following appeared:

‘1. It is generally in children's best interests to have shared residency and contact with their parents in separated families. Children should be allowed to equally foster their relationship with both their mother and their father. However, relocation makes this an unfeasible option, therefore primary residency with regular contact with the non-primary parent needs to be considered.

2. There appears to be no good reason why [the applicant] and [the first respondent] cannot reside in the same province for the sake of their children and their children's best interests; however, neither can be compelled to move which demonstrates a level of self-centeredness.’

[26] While there is much with which I do not agree in Ms Main-Baillie’s report, I also agree that there is nothing that prevents the parties from residing in the same province. That they do not is entirely due to choices that they have made.

[27] Thirdly, Ms Main-Baillie, in formulating her recommendations, clearly did not endorse the continued separation of the minor children. She accepted that they should be kept together but found that the parent to be entrusted with their care should be the person who hired her services, the applicant. Her principal reason for coming to this conclusion was the concept of parental alienation. This is, in essence, the manifestation of a form of emotional child abuse that occurs when one parent manipulates a child to turn the child against the other parent. This is not a theory and practice unknown to the courts of this country. It primarily manifests itself during high conflict divorces in which a child identifies strongly with one parent, usually the custodial parent. Ms Maine-Bailey

concluded that there was evidence of this having occurred with S and that the first respondent was the party responsible for it.

[28] My difficulty with this conclusion is that the first respondent has seen very little of S over the past three years. She is not S's custodial parent, the applicant is. Her opportunity to engage in this practice was thus restricted to say the least.

[29] The fourth difficulty that I have with Ms Main-Baillie's report is that it is simply not accurate. There are numerous examples of such inaccuracy, primarily, as already mentioned, because the report is outdated and the facts upon which she has reported are presently inaccurate. But the accuracy of her reasoning also appears to me to be unsound. I confine myself to a single example, although there are more. In her report, Ms Main-Baillie records that:

'[The applicant] is able to provide both children with a stable environment with structure, routine and predictability. [The first respondent] does not appear to be able to provide a stable and consistent home environment for the children as it was unclear where she is residing.'

Continuing with this theme, Ms Main-Baillie stated that:

'[The applicant] appears capable of providing for the children's practical, safety, intellectual and emotional needs; however, his affect is rather flattened and he will need to work on his energy of engagement when with the children.'

[30] There was no evidence whatsoever that the applicant was able to physically provide for S, or had provided for him on his own, let alone S and M together. He does not have his own home but has continued to reside at his older sister's home. He has never had to provide for one of his children, let alone two, on his own. This will become apparent when the evidence of his older sister is considered.

[31] Ms Main-Baillie did not impress me as a witness. While she boldly made statements in her report, she was less resolute in defending them under questioning. She stated that the applicant was drug free but then said that he could relapse. She said that M should be relocated to Johannesburg but then agreed that it would be very confusing for the little girl. I noticed that she was only able to fluently testify if she found her place in the report that she had prepared, and which was lying open before her in the witness box. Absent a specific reference to a portion of her report, her evidence became vague and unimpressive.

[32] By far the most impressive witness called by the applicant was his older sister, Ms G. She was as fine a witness, and a human being, as I have had the pleasure of hearing in court. She is intelligent and well-educated, holding a doctorate, and is well-spoken. And she is obviously blessed with an abundance of kindness. She is married but herself has no children. Her husband appears to be an exceptional human being as well, cut from the same cloth as she is. They reside in a two-bedroomed home in Johannesburg and welcomed the applicant into their home upon his arrival and gave up their bedroom on the upper floor of the dwelling so that the applicant and S could share it. They took up residence in the downstairs study, which remains their bedroom.

[33] The question was posed earlier as to how the applicant funded his lifestyle in Johannesburg. The answer is that he did not, his older sister and brother-in-law did. They funded the applicant's stay in Johannesburg. They paid for his trips to Pietermaritzburg to visit M. They paid for S's schooling at the Montessori school at which the applicant's younger sister is a teacher. Either Ms G, her husband or her younger sister would take S to school and one of them would fetch him at the conclusion of the school day and ferry him home. The applicant is not involved in any of these activities.

[34] Accordingly, if anyone provides physically for S, it is not the applicant, but it is his extended family, more particularly his older sister. I cannot speak more highly of Ms G. But, and this is a big but, she is not the mother of S nor is she the mother of M. If

primary care of the two children is given to the applicant, it is reasonably certain that the burden of caring for them will fall on, or will be willingly assumed by, Ms G.

[35] The applicant also testified. Ms Main-Baillie described him in her report as being possessed of a 'flat' attitude. That chimes with what I observed. He sat for the most part stony-faced while evidence was led and displayed no emotional responses at any time. As the trial progressed, I formed the impression that being the only male in the family, he had been over-indulged, particularly by his sisters. He was funded through most of his adult life by his family, firstly by his late mother and later by his older sister. It appears that he was not required to account for what he did with the money that he was given. His wife, the first respondent, worked: he did drugs.

[36] At the end of the first day of the trial, I suggested to the applicant and the first respondent that they should seriously consider their positions overnight and determine whether they were really acting in the best interests of their children. I was inclining to the view that neither of them was prepared to sacrifice their own personal interests for the greater good of their children. My appeal to them went unheeded and neither party shifted their position, and the trial continued into day two and then into day three.

[37] At one stage while the applicant was testifying, I asked him if he accepted that there was a time when he realised that the dream of living together with the first respondent and his children in Johannesburg was not going to be realised. He said that there was such a stage. I asked him why, having reached such an appreciation, he had not then returned S to the first respondent. Until that stage, S had lived his whole life in Pietermaritzburg and that was where his home had always been. I had heard no evidence that the parties had agreed that the applicant could keep S with him irrespective of whether or not the first respondent relocated to Johannesburg. That arrangement existed only so long as they both moved to Johannesburg. The applicant was not able to meaningfully respond to my question.

[38] The only answer that could be given for his failure to return S is that it suited the

applicant to keep S with him. In deciding that, it appears to me that the applicant placed his own interests above those of his children and demonstrated a certain self-centredness. While he admitted that he believed the children should be together, he was not prepared to allow that to occur if the parent granted care of both children was the first respondent.

[39] That the applicant is self-centred was rather perceptively acknowledged by Ms Main-Baillie in her report, when she stated:

‘He has also chosen, [sic] to place his own need to be in Johannesburg with his family above his children’s needs to have a relationship with both of his parents.’³

[40] While I have criticised Ms Main-Baillie’s evidence elsewhere in this judgment, I agree with her that there are unequivocal signs that the applicant has manipulated the situation to best suit himself. Two further examples of this bear mentioning in Ms Main-Baillie’s report. Firstly, she noted that:

‘Likewise, the applicant moved away with S to Johannesburg, and in so doing disrupted S’s relationship with the first respondent. Despite having the freedom to work remotely, the applicant has chosen to remain in Johannesburg, thereby separating the two families through significant practical distance.’

And secondly, she observed that:

‘Moving to Johannesburg appears to have been his own need, and one that was not urgent or even unavoidable given then (sic) he has not yet established his business, his work allows him to work remotely, and he has family and history in Pietermaritzburg. Whilst being with his family may be good for his psychological

³ I am not sure what the reference to ‘his parents’ in the extract mentioned is intended to mean. The applicant had no personal knowledge of his father who was absent from his life since shortly after his birth and his mother has passed away. It seems to me that what Ms Main-Baillie intended to say was not ‘his parents’ but rather ‘their parents,’ meaning the applicant and the first respondent.

well-being, he has not give (sic) much consideration to the impact of this separation on both the children, specifically on the separation of S and M, as well as S's separation from his mother.'

[41] All this accords with the view that I have of the applicant. I did not find him to be an impressive witness, and, in my view, his true nature became more apparent the longer he remained in the witness box.

The evidence called by the first respondent

[42] The first respondent briefly led the evidence of a clinical psychologist, Mr Clive Willows (Mr Willows). A man with a grizzled appearance, Mr Willows has great experience in his field of expertise. I found him to be refreshing in his approach to his evidence. He candidly told me up front that he did not believe that he could assist the court much: he had not spent sufficient time with the children, or their parents, to permit him to come to a recommendation. The value of his evidence was confined to two points. The first was that he had visited the first respondent's parent's home and described it as being perfectly adequate to accommodate the first respondent and the two children. The second point was his evidence that siblings should be raised together wherever possible. Mr Willows may not have thought his evidence would be of any assistance but in that he was mistaken.

[43] The first respondent took to the witness box. She partially testified. I say this because she was not cross-examined by counsel for the applicant. Shortly before the long adjournment was taken on the third and final day of the trial, the first respondent finished being led in her evidence in chief and counsel for the applicant, Mr Ender, was invited to commence his cross-examination of her. He did not do so but asked for the matter to stand down so that the possibility of settlement could be considered. I was surprised by this development but agreed to allow the parties an opportunity to resolve the matter.

[44] When the trial recommenced after standing down for several hours, I was handed a typed consent order (the consent order). Having briefly considered the terms of the consent order, I then stood the court down again, this time to further consider my position. I returned to court after half an hour and indicated that I did not believe the consent order would serve the best interests of the minor children. I requested Mr Ender to commence his cross-examination of the first respondent. He declined to do so but instead led her on why she had agreed to the consent order.

[45] None of the first respondent's evidence in chief was therefore challenged and Mr Dwayi, who appeared for her, closed her case after she finished giving her explanation to Mr Ender. No basis was consequently laid through cross-examination for it to be later argued that the first respondent's evidence should be rejected.

[46] Cross-examination is a vital part of a trial. The Constitutional Court summed up its value in observations that it made in *President of the Republic of South Africa and others v South African Rugby Football Union and others*:⁴

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.' (Footnotes omitted.)

⁴ *President of the Republic of South Africa and others v South African Rugby Football Union and others* [1999] ZACC 11; 2000 (1) SA 1 (CC) para 61.

[47] Before turning to assess the evidence of the first respondent, it is appropriate that the material terms of the consent order be stated. The principal terms read thus:

‘1. Primary care of S[...] D[...] R[...], a boy born of the parties’ union on 05 May 2017 (“S”) is awarded to the (sic) D[...] R[...] R[...] (“D”) and it is directed that S shall have his primary place of residence with D.

2. Primary care of M[...] R[...], a girl born of the parties’ union on 21 September 2021 (“M”) is awarded to the (sic) S[...] D[...] R[...] (“S”) and it is directed that M shall have her primary place of residence with S.’

[48] The consent order also dealt with the rights of contact of the non-custodial parent to the child not in their custody.

[49] Thus, the consent order was designed and intended to preserve the status quo. The same status quo that the applicant wished to upend by bringing his application, and which had been the genesis of the trial that I had just heard.

[50] Reverting to the evidence of the first respondent, she stated that she held, inter alia, a Bachelor of Arts degree in Psychology and a post-graduate diploma in public administration. She has registered her own company, which is active in the health care field, and she is its only director.

[51] She explained that she resides in her parents’ home in Pietermaritzburg. She accepted that she had agreed to relocate to Johannesburg but added that such agreement was subject to two conditions, namely that the applicant found employment and that he found a flat for her and their children to live in independently of the applicant’s family. The applicant assured her that both conditions would be achieved by him within three months. She testified that it was never achieved. According to her, he could not have secured employment within that period because after three months he had still not prepared his curriculum vitae for circulation to prospective employers.

[52] The first respondent indicated further that the applicant had been unemployed from 2016 to 2021. After moving to Johannesburg, he reported to her at one stage that he was feeling suicidal and that he thought he should return S to her. But he did not do so. The applicant refused to discuss the situation with her, but, instead, created a WhatsApp group, the members of which were the applicant, the first respondent and the applicant's two sisters.

[53] What then transpired, according to the first respondent's evidence, was that the applicant shifted the onus of finding employment and independent accommodation from himself to the first respondent: she should go to Johannesburg and find employment and the desired accommodation.

[54] On the issue of parental alienation, the first respondent denied that she had ever 'coached' S. She stated that she was not told when S would have his sessions with Ms Main-Baillie, nor was she present when they occurred. She stated that even if she had wished to do so, she simply did not have the opportunity to do so.

[55] The first respondent testified further that while the applicant was in Johannesburg, he made no effort to contact M. Even when he had come down for this trial, he still made no effort to see M.

[56] One of the complaints made by the applicant in his evidence was that he had not known of the birth of M and had not been allowed to attend her birth. The first respondent admitted that the latter allegation was true. But there was an explanation for this. M was born during the height of the COVID-19 pandemic and no-one, not even a prospective father, was permitted to attend the birth of their child in hospital. That is a lived experience which resonates.

[57] I remain mindful of the fact that I never saw the first respondent subjected to the pressures of cross-examination, but I found her overall to be a good witness who

expressed herself clearly and well. I also assessed her to be long-suffering, having stood by the applicant while he fought his battle against drug addiction. Her evidence had the ring of authenticity to it and was not given, in my opinion, in order to secure an advantage for herself, but rather was comprised of sincere responses to the questions that were put to her.

[58] As to why she agreed to the terms of the consent order, the first respondent explained that S had been in Johannesburg for three years and appeared to be settled there. If he were required to relocate to Pietermaritzburg, he would be distressed and would have to commence schooling at a new school where he would not have any friends. She did not want him to be unhappy. In those circumstances, she indicated that she was prepared to sacrifice her needs to be with him to ensure that he was happy.

[59] This was the first indication that one of the parents was prepared to make their interests secondary to the interests of a child.

The report of the second respondent

[60] The final piece of evidence to be considered is the report that I ordered to be produced by the second respondent. It is comprised of a report from the Family Advocate (the Family Advocate) and a report from a family counsellor (the Family Counsellor).

[61] The criticism that I had of the report of Ms Main-Baillie is of equal application to both of these reports: they, too, are hopelessly out of date. Both reports are dated 20 September 2022. As already observed, much has changed since then.

[62] The Family Advocate reported that when she considered the matter, the applicant was already of the view that S was well-settled in his new home and school. In fact, his sojourn there had really only just begun. The first respondent had informed the Family Advocate that it was not desirable, in her view, to separate the children. This

seemed to accord with the views of the Family Advocate who reported that:

‘The Family Advocate does not endorse separating siblings especially during this (sic) tender ages. The minor child in question is much too young to be separated from his sibling.’

[63] The Family Advocate found the first respondent to be a:

‘... stable and a competent parent to be taking care of her young children.’

The Family Counsellor also recorded in her report that the applicant had no concerns about the first respondent’s parenting capacity nor her place of residence. As a consequence, both the Family Advocate and the Family Counsellor recommended that both children reside with the first respondent.

Argument

[64] Having heard all the evidence and having been presented with the consent order, I indicated to counsel that I required written argument on why the terms of the consent order should be accepted by the court. Both parties counsel duly submitted written arguments of differing quality.

[65] Mr Ender, for the applicant, emphasised in his written argument that the court was required to ensure that the best interests of the minor children were protected. He drew attention to the fact that S has now resided in Johannesburg for three years and that his parents, in agreeing to the terms of the consent order, have implicitly regarded it as being in his best interests for him to continue to remain in Johannesburg.

[66] On whether it should be ordered that S return to the care of the first respondent, it was submitted that such an order would be ‘extraordinary’, because there was no:

‘... professional, objective and thorough psychological assessment’

performed on S to establish how that move would affect him. In truth, a similar argument could be raised on the initial decision that the applicant and first respondent took to separate the children: there was no psychological assessment performed on S then either to assess whether he would be able to cope with the relocation. The fact of the matter is that children are moved on a daily basis throughout our country without deleterious effects upon them. Children whose parents are transferred by an employer from one town to another or from one province to another or even from one country to another are required to commence new friendships and endure different surroundings when they move. The same happens when they graduate from a primary school to a high school. Children are resilient and they adapt far better and quicker to change than adults generally do.

[67] It was further submitted that to the extent that the court was considering ordering S to return to the care of the first respondent, there was no counter-application to motivate why this should occur. I do not attach any significance to this submission, for one of the issues defined in the order of Sibiya J was whether the children should be separated from each other. It would be nonsensical for me to determine that issue and, in the event of me finding that they should not be separated, not be able to order that they resume living together.

[68] The argument was advanced that S was thriving in the environment in which he now found himself. That may be so. But what is good for S is not the only factor that requires consideration. M has the right to develop a relationship with her brother, as any sibling has. In focussing only on S, the needs of M are cast into darkness.

[69] Mr Ender submitted that:

‘... there is no evidence to support a conclusion that the Plaintiff was governed by egocentricity or selfishness, that he considered the Defendant’s views to be

irrelevant, or that his own rights should trump her right to pursue a fulfilling and meaningful career of her own.’

I cannot agree with that submission for the simple reason that Ms Main-Baillie herself recognised that the applicant, her client, was entirely self-centred, as previously discussed in this judgment.

[70] It was further argued that there was nothing to contradict the applicant’s evidence that what little work he was able to secure in Pietermaritzburg was insufficient to allow him to provide for his family. In formulating that submission, no regard has been paid to the evidence of the first respondent that from 2016 to 2021, the applicant simply did not work. She contradicted the applicant but because she was never cross-examined, her evidence, ironically given the nature of the submission, was itself not contradicted.

[71] Finally, it was submitted that the consent order would ensure that each child would remain with their current primary caregiver. On the evidence before me, that statement insofar as it relates to S is simply incorrect. On the evidence before me, the applicant is not his primary caregiver. The applicant’s extended family appears to be the true caregiver.

[72] The first respondent’s counsel, Mr Dwayi, submitted what can only be described as thoroughly confusing written argument. That confusion is demonstrated by the following submission that appears in the argument:

‘7.1 We submit that:

7.1.1 S should have his primary place of residence with the Defendant at No. 8[...] T[...] Road, Pelham, in Pietermaritzburg;

7.1.2 M should have her primary place of residence with the Defendant at No. 8[...] T[...] Road, Pelham, Pietermaritzburg;

7.1.3 It would not serve the best interests of S and M for them to be separated and have different custodial parents.’

[73] Thus, the submission was made that the children should no longer be separated but should be permitted to both reside with their mother, the first respondent, in Pietermaritzburg. Having made that submission, the first respondent added a contrary final submission in the following terms:

‘7.1.20We submit that the proposed order will be in the best interests of the minor children, that:

1. Primary care of S[...] D[...] R[...], a boy born of the parties’ union on 05 May 2017 (“S”) close brackets is awarded to the (sic) D[...] R[...] R[...] (“D”) and it is directed that S shall have his primary place of residence with D.
2. Primary care of M[...] R[...], a girl born of the parties’ union on 21 September 2021 (“M”) is awarded to the (sic) S[...] D[...] R[...] (“S”) and it is directed that M shall have her primary place of residence with S.’

[74] Despite the earlier submission that separation should not occur, separation is what Mr Dwayi ultimately submitted should occur. It is clear that no thought whatsoever went into the preparation of the argument: it was a copy and paste exercise that unfortunately also duplicated the grammatical errors that appear in the consent order.

[75] That argument gave me no insight into why the first respondent believed the consent order should be granted. That, after all, was the reason why I called for the written argument.

Analysis

[76] The order of Sibiya J referring the matter to trial identified five issues that needed to be determined by the court hearing the oral evidence. The last issue was whether the children should be separated and have different custodial parents. In my opinion, that ought to have been the very first issue to be determined. If the answer to that issue was that they should not be separated, then the other issues identified, save for the question of contact, largely fall away.

[77] All the witnesses that testified acknowledged that it was desirable that the children be raised together. This accords with the conventional thinking on the issue, and the thinking of courts, generally. In *Van der Linde v Van Der Linde*,⁵ the court opined that, *ceteris paribus*, siblings should not be unnecessarily separated from each other. The court explained that the reason for this is that:

‘... siblings experiencing the trauma of a divorce tend to form a bond with each other. A bond which to a great extent gives them a feeling of security against the ‘onslaught from outside’. On the other hand, however, it will be necessary for children to be separated from each other if one child with the custodian parent is not properly cared for or is neglected. Also if the change will be a substantial improvement.’

[78] There are other convincing reasons why siblings should be kept together where possible. One obvious reason is that children learn not only from their parents but also from their brothers and sisters. Sharing a home and a relationship with a sibling allows a child to observe and copy social skills already possessed by their sibling and being with a sibling helps the development, over time, of emotional intelligence. There are a myriad of benefits that have contributed to the conventional wisdom that children born to the same parents should be kept together and raised to adulthood together.

[79] The Family Advocate has recommended that S and M be raised under a single

⁵ *Van der Linde v Van der Linde* 1996 (3) SA 509 (O) at 510F-G in the headnote.

roof. I do not lose sight of the fact that the recommendation was made two years ago, but it accords with sound common sense. I appreciate, further, that I am not obliged to slavishly follow the recommendations of the Family Advocate,⁶ but in this instance, I am not persuaded that the Family Advocate's recommendation is unsound.

[80] It is so that the high court is the upper guardian of all minors when it comes to determining what is in their best interests. The high court, in acting in that capacity, must identify what is in the best interests of minor children and then make orders that ensure that those interests are served and safeguarded.⁷ In doing so, the high court essentially arrives at a value judgment. In *Terblanche v Terblanche*,⁸ the court identified its powers where the issue is the custody of minor children as follows:

‘... it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.’

[81] Considering the facts of this matter and the late development that occurred on the final day of trial, I have no doubt that the consent order presented to the court by the parties was formulated at the instance of the applicant in an attempt to salvage something from what was becoming a desperate situation for him. The evidence that had been called brought to the foreground two applicable principles: very young children are not easily separated from their primary caregiver and the previously mentioned principle that siblings should generally be kept together.

[82] If those two principles are applied, then, as Mr Willows stated in a letter dated 28 February 2024:

⁶ *ZDE v CE* [2024] ZASCA 159 para 20; *NV v CL* [2022] ZAFSHC 284 para 65.

⁷ *Girdwood v Girdwood* 1995 (4) SA 698 (C) at 708J-709A.

⁸ *Terblanche v Terblanche* 1992 (1) SA 501 (W) at 504C-D.

‘... it will require very detailed analysis and well substantiated motivations to support that these circumstances be maintained based on the opinion that they meet the criteria of the best interests of the children.’

The circumstances referred to in the letter was the continued separation of the minor children in this matter. In other words, there would have to be persuasive evidence that something that is palpably not in the children’s best interests should be permitted to prevail. I discern no such evidence in this matter. The only factor that can be advanced by the applicant is that S has been where he is for the past three years.

[83] The consent order appears to directly acknowledge the correctness of at least one of the two principles that I have just mentioned, namely that young children should not be easily separated from their primary caregiver. This would appear to be the case because the applicant, in agreeing to the terms of the consent order, no longer sought the exclusive care of M. This was a significant development, for the care of M was the catalyst that prompted the bringing of this application. The applicant already had the care of S and wanted the care of M as well. I do not accept that the abandonment of the care of M was as a result of a Damascus Road experience by the applicant in which he was suddenly and powerfully struck by the realisation of the folly of his trying to pry M away from the first respondent. Had he applied his mind to this before bringing his application, the difficulty of what he proposed to do would have leapt out at him. The evidence shows that he is a self-oriented person, and the consent order was intended to ensure that he did not lose care of S.

[84] The consent order came after three days of evidence and it attempted, essentially, to reverse the evidence heard on those days. It sought to place the parties back at the point that they were in before the trial began. My difficulty with the consent order is that it does not serve the best interests of the minor children. There is no sound reason why the children should not be raised together.

[85] The first respondent was ill advised in agreeing to the consent order. But as

upper guardian of minor children, this court is not obliged to give effect to agreements incorrectly struck that do not serve the interests of minors. In *ZDE v SC*,⁹ the Supreme Court of Appeal observed that:

‘Whilst the parties’ right to contract should be respected, in matters dealing with minor children, the court has a duty to enquire whether any arrangement by the parties would serve the best interests of A. Even though Mrs E had initially bound herself to the settlement agreement, the high court, as upper guardian of A, had a duty to interrogate the facts and the arrangements made in the agreement insofar as they related to the best interests of A. The court had to be satisfied that the provisions made for the welfare of A were satisfactory and in her interest.

[86] I have adopted this approach in considering and evaluating the terms of the consent order and having done so, I do not intend giving effect to it.

[87] Why I do not believe that the consent order serves the best interests of S and M is that it has as its central premise the idea that the continued separation of the children is in their best interests and cannot be unwound because of the fact that S has resided with his father for the past three years. That is false logic. The true question to ask is whether the separation of the children from each other is in their best interests. That question cannot simply be answered by considering only the best interests of S, which appears to me to be precisely what the applicant has done in crafting his written argument along the following lines:

(a) S is thriving in Johannesburg; and

(b) S is loved by the extended family with whom he lives

and therefore he cannot be placed in the care of his mother.

⁹ *ZDE v CE* [2024] ZASCA 159.

[88] No argument is advanced at all that considers the problem from the viewpoint of M. The best interests of both children must be considered, not just the best interests of one of two children.

[89] I have considered whether the first respondent's agreement to compromise her interests in favour of her son's interests should not be acknowledged and given effect to. She, after all, is his biological mother and knows him best. I do not know him at all. If she believes the consent order to be in his best interests, should I not honour this?

[90] I have decided not to, for a number of reasons. S is seven years old, shortly to be eight, and he is young enough to make a fresh start again in Pietermaritzburg. I have no doubt that the relocation that I intend to order will occasion days of unhappiness in S's life, but the resilience of young people teaches us that any lived misery is but of brief duration, and he will overcome it. The joy that he will undoubtedly experience in resuming his relationship with his sister will, perhaps, take the edge off his immediate unhappiness. It would be intolerable, in my view, if, at the age of seven, S is permanently deprived of the right to grow up with his sister and if M, correspondingly, is deprived of the right to mature alongside her brother. They both have the right to remain with each other, provided that there are no compelling circumstances that exist to make that impossible or undesirable. I can discern no such limiting factors and there are no factors that dictate that I should order that the two children remain apart.

[91] The answer to the fifth question posed by the order of Sibiya J is thus that S and M should not be separated and that the parent who should be awarded their custody is the first respondent.

[92] The only other issue that needs to be addressed, therefore, is the applicant's rights of access to the children. Helpfully, the parties, in agreeing to separate the children in the consent order, agreed to their respective rights of access to the child not in their care. The applicant consented to an order allowing the first respondent to have contact with S, presumably on the basis that it was fair and reasonable. He can

therefore have no complaint if he is granted that same contact.

[93] As regards contact with M, the applicant's own witness, Ms Main-Baillie, stated that he had no real relationship with her. I do not think that in those circumstances the applicant should be afforded overnight contact with her before she is of school-going age. That interregnum will allow him to nurture and cultivate his relationship with her.

Costs

[94] I am aware that in matters such as the present, courts are generally reluctant to grant costs orders because the parents in commencing, and continuing, with litigation are acting in what they believe to be the best interests of their children.¹⁰

[95] It is so that the applicant brought the application and claimed primary care of both children. He ultimately abandoned that relief in agreeing to the consent order and, in the end, sought merely to preserve the existing status quo. Costs of litigation are awarded in the exercise of a court's discretion. After consideration of the competing interests, I am of the view that the interests of justice would be best served if I were to order that each party shall pay their own costs.

Order

[96] I consequently grant the following order:

Primary care of S and M

1. Primary care of S[...] D[...] R[...] (S), a boy born on 5 May 2017, and M[...] R[...] (M), a girl born on 21 September 2021, is awarded to the first respondent and both children shall have their primary place of residence with the first respondent.

¹⁰ *F v F* 2006 (3) SA 42 (SCA) para 28; *TN v NN* 2018 (4) SA 316 (WCC) para 31; *WB v RB and another* 2024 (4) SA 316 (KZD) para 45.

Contact by the applicant with S

2. The applicant shall be entitled to exercise contact with the minor child S as follows:

(a) where possible, and only following prior confirmation by the applicant with the first respondent at least 72 hours prior to the intended visit, on the second and fourth weekends of every month commencing on Friday afternoon at 14h00 and terminating on Sunday evening at 18h00;

(b) during the long school holidays, which are to be divided in two and shared equally between the applicant and the first respondent; and

(c) during the short school holidays, which are to be alternated between the applicant and the first respondent.

3. In addition to the abovementioned contact, the applicant shall be entitled to reasonable telephone and video contact with S on a daily basis by arrangement with the first respondent.

Contact by the applicant with M

4. The applicant shall be entitled to exercise contact with the minor child M where possible, and only following prior confirmation by the applicant with the first respondent at least 72 hours prior to the intended visit, on the second and fourth weekends of every month.

5. Such contact shall be exercised as follows until M reaches school going age:

(a) commencing on Friday afternoon at 14h00 and terminating at 18h00 on

Friday evening;

(b) commencing on Saturday morning at 09h00 and terminating on Saturday evening at 18h00; and

(c) commencing on Sunday morning at 09h00 and terminating on Sunday evening at 18h00.

6. In addition to the abovementioned contact, the applicant shall be entitled to reasonable telephone and video contact with M on a daily basis by arrangement with the first respondent.

7. Upon M attaining school going age, the parties, or any one of them, shall be entitled to seek the variation of the order relating to the first applicant's contact with M.

Costs

8. There shall be no order as to costs.

MOSSOP J

APPEARANCES

Counsel for the applicants:

Instructed by:

Mr G E Ender

Velile Tinto and Associates

Suite 3, Terrace View

Aspen Place
8 Rydall Vale Office Park
Douglas Saunders Drive
La Lucia Ridge

Locally represented by:

J Leslie Smith and Company Inc
332 Jabu Ndlovu Street
Pietermaritzburg

Counsel for the first respondent:
Instructed by:

Mr M N Dwayi
Legal Aid South Africa
187 Hoosen Haffeejee Street
Pietermaritzburg

Counsel for the second respondent:

No appearance