

SOUTH AFRICA / JUDGMENT

S.M.H v C.A.H (Born G) (2262/2015)

[2015] ZAECPEHC 45 (2 July 2015)

[2015] ZAECPEHC 45**COURT**

Eastern Cape High Court, Port Elizabeth

BEFORE

E Revelas

CASE / FILE NUMBER

2262/2015

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****EASTERN CAPE LOCAL****DIVISION – PORT ELIZABETH****Case No: 2262/2015****DATE: 02 JULY 2015****Not Reportable**

In the matter between:

[S.....] [M.....]

[H.....].....Plaintiff

And

[C.....] [A....]

[H.....] (Born

G.....).....Defendant

JUDGMENT

Revelas J:

- [1] The applicant approached this court in urgent proceedings, seeking the following order against the respondent, his former wife:

“1. That leave be granted that this matter be heard as one of urgency in terms of rule 6(1) of the Uniform Rules of Court and condoning the applicant’s non-compliance with the rules pertaining to form, time periods and service.

2. That it be declared that the respondent is in contempt of the divorce order granted by the Port Elizabeth Regional Court on 10 September 2012 under case number ECPERC 3034/2011, in particular 4(a), (b), (d) and (f) of the Deed of Settlement concluded between the parties on 8 August 2012 which was incorporate in the said divorce order.
3. That the two children born from the parties erstwhile marriage, namely [D.....] [J.....] [H.....] and [E.....] [R....] [H.....] (“the minor children”) be returned to Port Elizabeth forthwith and be placed in the care of the applicant alternatively in the care of the respondent in the event that she returns to Port Elizabeth with the minor children pending the outcome of an enquiry which the Port Elizabeth Family Advocates Office is hereby directed to institute as soon as is reasonably practical to enquire into whether it will be in the minor children’s best interests to

relocate with the respondent from Port Elizabeth to such other city as the respondent may indicate she intends to relocate and to report his/her recommendations as soon as is reasonably practical and/or achievable.

4. That the parties and the minor children submit themselves to a full forensic investigation and assessment by a clinical psychologist as directed by the Family Advocates Office or as may be agreed to between the parties.
 5. That pending the enquiry and assessment referred to paragraphs 3 and 4 above the parent in whose care the children are not living primarily whilst they are in Port Elizabeth shall exercise contact with the minor children as set out in the parties amended Deed of Settlement concluded on 7 October 2013 and made an order of the Port Elizabeth Regional Court on 3 December 2013 under case number ECPERC 3034/2011.
 6. That the respondent be interdicted from removing the minor children from the jurisdiction of this Honourable Court unless the applicant has given his written consent.
 7. That the costs of the application be borne by the respondent”.
- [2] It is common cause that the applicant and respondent were married to each other on 10 December

1994. Two sons, D..... and E..... were born of the marriage in 2001 and 2010 respectively. On 10 September 2012 the bonds of marriage were dissolved by a decree of divorce in the Regional Court, Port Elizabeth. A settlement agreement entered into by the parties was incorporated in the decree of divorce. The agreement contained several clauses regarding contact arrangements, decisions and parental responsibilities regarding their minor sons. The respondent was appointed to be the primary caregiver (in clause 3.3) In terms of the settlement agreement the parties were appointed as co-holders of parental responsibilities and rights in respect of the children, as envisaged in the Children's Act, 38 of 2005. Paragraph 4 of the deed of settlement provided that the respondent and the applicant would make joint decisions concerning the general welfare of the children which included the following:

- 4.1 Major decisions about the children's primary, secondary and tertiary education, including the children's enrolment at any educational institution and the child's choice of educational subjects and extra mural activities;
- 4.2 Major decisions about the children's health care medical care, including the necessity for the children to consult with a psychologist at any time and any elective medical treatment that may be required by the children other than in the event of an emergency;
- 4.3 Major decisions about the children's religious and spiritual upbringing;
- 4.4 Decisions concerning the children's resident outside of Port Elizabeth (emphasis added);
- 4.5 Decisions affecting contact between the children and the parties 4.6 decisions which are likely to significantly change the children's living conditions or have an adverse effect on the well-being;
- 4.7 The ordinary day to day decisions concerning the children should be made by the party in whose care children are at the time.

- [3] The applicant complains that notwithstanding the terms of the agreement reached with the respondent regarding the exercise of the applicant's contact with the minor children since the divorce, the respondent from time to time challenged the applicant when he sought to exercise contact with the children in terms of the agreement reached over for instance during September 2012, during school holidays, it was agreed that the applicant would have contact with the children for the entire holiday period. The applicant approached the Family Advocate and through their intervention the parties reached another agreement regarding the children spending time with the applicant in the school holidays.
- [4] In 2013 problems arose again with regard to the applicant's contact with the children. The children and the respondent went on holiday to the Baviaanskloof and without telling the applicant the respondent took the children to Durban and withheld this detail from the applicant, but the applicant had learnt about it through a third party. The applicant was aggrieved that his son [D.....] had lied to him about this. The respondent explained that [D.....] was told to lie by her because the applicant's temper caused too many problems and

they had feared that he would become upset by their change in plans. The applicant sent a barrage of insulting and abusive angry text messages to his son.

- [5] On 22 January 2013, the respondent obtained a protection order from the Domestic Violence Court in Port Elizabeth. The applicant explained that his anger about the holiday incident probably “culminated” in her approaching that court. The grounds advanced by the respondent for obtaining a protection order from the aforementioned court, was however, the following:

“Leading up to and since my divorce from the respondent in September 2012, due to his infidelity, there has been an non-stop barrage of emotionally abusive and at times threatening emails and text messages. The messages are defamatory, blasphemous and threatening.

I am for instance referred to as a ‘cunt, bitch bad mother’ and someone who is in need of professional help. Copies of the emails and text messages will be made available for court.....

The email and text messages are just never ending and the threats appear to be increasing in intensity. Other than being soul destroying I am beginning to fear what the respondent [the applicant] is planning next.

The messages are becoming not only abusive but on menacing and cruel. I cannot carry on my fearful of receiving text or opening my emails anymore and I am bringing the application out of sincere desperation”.

- [6] The applicant accompanied his girlfriend to Germany in 2013 and subsequently, on his return wanted to establish weekend contact with the children but was unable to do so initially but eventually succeeded. [D.....] then informed him after the week-end that he does not want to see the applicant again. The applicant found this surprising. However, if one reads the hurtful text messages sent by the applicant to his son, it should not have been at all surprising to him.
- [7] The applicant, in the belief that the respondent was not complying with the agreement, in the sense that she acted unilaterally, approached the Family Advocate for an intervention. Dr Gillian Smale, a psychologist was engaged. The respondent felt that Dr Smale permitted the applicant to taunt her as she sat passively by when the applicant laughed at her. Another settlement agreement was reached pertaining to specific holidays. This agreement was also made an order of the Regional Court on 10 September 2013.
- [8] In 2014, [E.....] had also changed schools without the applicant being consulted about it and the applicant found out that the respondent had taken [D.....] to a psychologist without his consent. The applicant’s subsequent e-mails to [D.....] lead the respondent to lay charges with police alleging that the applicant had breached the protection order. Ms Le Roux, a prosecutor tried to mediate between the parties but in the applicant’s view she was biased in favour of the respondent. [D.....] subsequently laid charges of intimidation against the applicant. This was in response to the applicant’s text message to [D.....] wherein he threatened to beat [D.....] up at his school “in

front of [his] mates” because he had “crossed the line.”

- [9] The respondent, earlier this year, without consulting the applicant, left Port Elizabeth and took the two children with her. They are presently living with her parents in Pietermaritzburg and the applicant is aggrieved by the respondent’s “unilateral” action in taking decisions contrary to the provisions of the settlement agreement. Hence the present urgent application.
- [10] In a technical since the respondent had indeed breached the terms of the settlement agreements reached, but explained her reasons for doing so. She is clearly not in contempt of court. She stated that she was concerned about the psychological effect of the applicant's constant taunting and threats were starting to affect her daily life as she was constantly frightened of what he had in store for her next and found herself a nervous wreck every time the phone rang. The applicant accused her of being a bad mother in front of the children and uttered threats that the family advocate would side with him and that he would take the children away from her. Against this background of threats and constant derogatory text messages and emails, the respondent secured the protection order against the applicant. She pointed out that what was noteworthy from the messages the applicant sent to [D.....],

was is that he told [D.....] more than once that he was no longer [D.....’s] father and that [D.....] must “fuck of”. He then threatened that are he would discontinue certain benefits regarding [D.....’s]

cell phone. These were terminated. [D.....] then refused to visit his father as provided for in the settlement agreement.

- [11] The respondent further explained that during 2014 the applicant started sending defamatory emails to her addressed to [D.....] regarding the applicant, and he would also leave documentation pertaining to their divorce and letters from the parties attorneys in [D.....’s] room for him to read together with snide comments about the respondent.
- [12] During November 2014 even more abusive text messages were sent by the applicant. These were attached to the applicant’s papers. The respondent explained that she took [D.....] to a psychologist because he started getting sick, complaining of headaches and vomiting resulting him in missing school which, according to the respondent, was uncharacteristic behaviour. This prompted her to seek the professional opinion of a psychologist the ensuing discussions, led her to the idea of leaving our Port Elizabeth and moving to Pietermaritzburg where her parents lived. She had also discussed the question regarding the possibility to move to Pietermaritzburg with her instructing attorney, a child psychologist called Rose Gowar, a child psychologist Mr Dale McGregor and a school counsellor at the high school, and all of them strongly recommended that she move away, some insisting that she did so without delay. No concerns were raised by any of the persons whom she consulted. The respondent mentioned that she was also “begged by the applicant's family to leave town”.

She stated that she moved from Port Elizabeth in a desperate bid to improve the current circumstances of her and the children, and in particularly [D.....'s] circumstances. Since she has been living in Pietermaritzburg, Ethan was already sleeping better than before, and [D....] has become totally relaxed. They are currently surrounded by family and friends of many years and the respondents believes that it is in the best interests of the children that they continue to live away from Port Elizabeth and be afforded the opportunity to rebuild the lives again. The children, in particular [D.....], is according to the respondent clearly in need of being removed from stressful situation which they had been facing on a daily basis. In the circumstances there was no basis to grant the relief sought in the notice of motion.

[13] When the application was heard, the applicant, wisely so, did not persist with the relief sought in his notice of motion. Both parties presented me with draft orders proposing that the children remain in the care of the respondent in Pietermaritzburg and that the offices of the family advocate be directed to institute and conduct an enquiry into, and report on, whether it is in the best interests of the two children that they reside with the respondent in Pietermaritzburg. The measures for restoration of the relationship between the applicant and D..... and a recommendation regarding the phasing in of contact between them

should also be investigated and reported on. Both parties further proposed that they submit themselves to a full forensic investigation

and assessment by a clinical psychologist. They were also in agreement as to some contact arrangements regarding the applicant

which are listed in both draft orders.

[14] The applicant proposed that the application be postponed sine die, pending the investigation referred to above. The respondent disagreed. Another aspect on which they differ, is on the applicant's proposal that in the event of any decision regarding their shared responsibilities, that dispute shall be referred to a facilitator (one Tracey Leigh Wessels was proposed by the applicant) to facilitate the resolution of any disputes arising from the exercise of the parties' parental responsibilities and rights. Several duties and powers to be conferred upon the facilitator was also listed.

Conclusion

[15] The basis upon which the applicant brought his application and the relief sought therein, was ill-founded, and bad in law as it was in effect a spoliation order. The applicant could never hope to obtain the relief sought therein on the same papers in the future. I am therefore not prepared to postpone this application. If the report which will emanate from the investigations of the Family Advocate requires the attention of this court at some future date, any application brought by either party will be based on new facts. At this point it is not certain what those investigations will reveal. The applicant's draft order in any event proposed measures which were designed to avoid further litigation.

[16] Counsel for the applicant addressed me at some length about the need for a facilitator. Such an appointment would be premature and the many stipulations to monitor and control the conduct of the parties, is far too complex. In my view, the long list of how the facilitator should address matters, how the parties should respond thereto in possible situations, (also listed) is very controlling and will foster conflict. The investigations of the Family Advocate may or may not reveal that a facilitator is required, but at this point, given the present situation, a facilitator ought not to be appointed. What the applicant envisages with regards to a facilitator will also be a very costly exercise. It is abundantly clear from the papers that the relationship between the applicant and his eldest son has broken down to an extent which raises great concern. The applicant's messages to his son were puerile, aggressive, intimidating and abusive. The son's responses to him were disrespectful in the extreme and it is clear that he is very angry with his father. A careful reading of the exchanges between them in the text messages that were attached to the papers of both parties, gives one the impression that the prospects of restoring a normal father and son relationship between the applicant and his eldest son in the near future are rather slim. The parties need time to reflect apart from each other and the investigation must begin to end this very sad period in their lives. The applicant and his son need therapy, and not control by an outside. There are enough such persons engaged at present.

[17] In the circumstances, the respondent's draft order is therefore to be made an order of court.

Costs

[18] The situation which prevailed and prompted the applicant to bring the present application, was of his own making. His temper and compulsion to express his anger in vituperate writing, drove the respondent out of Port Elizabeth. There is therefore no reason why costs should not follow the result.

[19] In the result the following order is made.

1. The Family Advocates Office is hereby directed to institute and conduct an enquiry ("the enquiry") as soon as is reasonably practical to investigate and to report on, but not limited to the following:

- 1.1 Whether it will be in the best interests of the two children born from the parties' erstwhile marriage, namely [D.....] [J.....] [H.....] and [E.....] [R.....] [H.....] ("the children") to reside with the respondent in Pietermaritzburg.

- 1.2 Measures for the restoration of the relationship between the applicant and D..... and recommendation as to the phasing in of such contact, if any.

- 1.3 The scope and extent of the applicant's contact with the children, if any.

2. The parties and the minor children shall submit themselves to a full forensic investigation and assessment by Clive Willows, a clinical psychologist or any other psychologist recommended by the Family Advocate if the parties are in disagreement, on this aspect. (The costs of the psychologist shall be shared by the parties).
3. That pending the outcome of the enquiry and assessment referred to in paragraphs 1 and 2 above, the minor children shall remain in the respondent's care in Pietermaritzburg and the applicant shall exercise the following contact, subject to such wishes as the particular child may express and to such scholastic and extra mural activities that the particular child may be engaged in:

3.1 In respect of D.....:

3.2 As may be requested by D..... and/or the professionals conducting the enquiry.

3.3 In respect of Ethan:

3.2.1 Daily telephonic contact anytime between 19:00 and 19:30 save for Tuesdays and Thursdays when there shall be Skype (video) contact anytime between 19:00 and 19:30, where reasonably possible, which contact shall commence from Monday 22 June 2015 save for when E..... is in the applicant's care as set out below. It being recorded that in the latter instance the respondent will be entitled to the same telephonic/skype contact as stipulated above.

3.2.2 2015 School Holidays:

3.2.2.1 During the June/July school holidays from 26 June 2015 to 5 July 2015 in Durban and surrounding areas. The hand-over shall take place at the Pavilion Shopping Centre in Durban at 12:00 on the respective dates.

3.2.2.2 The entire September/October holiday. The applicant will fly to Durban to collect E..... on 3 October 2015 and accompany him on his return to Durban on 10 October 2015.

3.2.2.3 From 27 December 2015 to 12 January 2016. The applicant shall collect E..... at the Pavilion Shopping Centre in Durban at 12:00 on 27 December 2015 and will accompany him on his return to Durban by air on 12 January 2016.

3.2.2.4 The applicant shall timeously advise the respondent in writing of all travel arrangements in respect of E..... as set out above.

3.2.2.5 Insofar applicant's contract beyond the December 2015/January 2016 holiday with E..... is concerned and in the event that the enquiry and assessment as set out in paragraphs 1 and 2 above has not been finalised, the parties will make all reasonable attempts to reach agreement regarding the applicant's future contact with E.....

4. The parties agree that should any decision referred to above or any dispute regarding their shared parental responsibilities and rights and contact with the children be cause for a dispute between them, such dispute shall be referred to the family advocate and/or the professionals undertaking the enquiry in order to facilitate the resolution of any disputes arising from the exercise of the parties parental responsibilities and rights.
5. The applicant to pay the costs of the application.

E Revelas

Judge of the High Court

Counsel for the applicant Adv G Gajjar instructed by Greyvensteins Attorneys.

Counsel for the defendant Adv H Ayerst instructed by Morne Struwig Inc.

Date Heard: 19 June 2015

Date Delivered: 2 July 2015

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