IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 43989/2014

(1)	REPORTABLE: ~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED.
14.12.2921	Electronic
DATE	SIGNATURE

In the matter between:

S; R H C Applicant

and

S; S C (born C) Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] The applicant, R S, is the father of two sons, M S and E S (jointly referred to as the 'children'), who are the subject of these proceedings. The respondent, S C, is the mother of the children.

[2] The applicant seeks an order for the appointment of Professor Tanya Robinson, a forensic social worker, ('Robinson'), in terms of sections 29(5)(a), (b) and (c) of the Children's Act, 38 of 2005 (the 'Act'), to investigate and report on the children's future care regime. More specifically, to investigate whether it is in the children's best interests that their primary care be awarded to the applicant, alternately, be shared between the applicant and the respondent, the contact arrangements that best facilitate the children's interests and relief ancillary thereto.

[3] In the event that Robinson concludes that it is in the children's best interests that the settlement agreement concluded between the parties upon their divorce in November 2017 (the 'settlement'), be varied to give effect to a new care and contact regime, that the applicant be granted leave to approach a court on these papers, duly supplemented, to seek *inter alia* a variation of the children's parental regime based on Robinson's recommendations.

[4] Additionally, the applicant seeks an interdict:

4.1 Restraining the respondent from physically disciplining the children in any manner whatsoever pending the completion of Robinson's forensic investigation and pending the outcome of legal proceedings to be instituted against the respondent within 30 days of delivery of Robinson's report of the investigation.

[5] The applicant tenders payment of Robinson's costs of the investigation and report.

[6] The respondent opposes the application.

[7] The applicant withdrew the supplementary affidavit delivered on 22 July 2021, at the hearing before me.

[8] The applicant launched this application on 25 January 2021, claiming relief substantially similar to that sought before me. The applicant escalated the matter to be heard urgently during March 2021, in that the respondent allegedly inflicted corporal punishment on the children. The respondent refused to furnish an undertaking that she would not do so pending the outcome of the application for Robinson's appointment in the ordinary course.

[9] The urgent court, having heard argument on urgency and the merits of the application, granted judgment removing the matter from the roll for want of urgency and ordered costs against the applicant.

[10] The children are eleven (11) and nine (9) years of age respectively. N S was born on 5 April 2010 and E S on 30 September 2012.

[11] M S is a special needs child, diagnosed with Hirschsprung's disease, a neurological condition suffered by M S since his birth. The disease causes M S anxiety and physical discomfort. Changes in M S's routine such as those necessitated by the 'lockdowns' under the Disaster Management Regulations during 2020, cause him distress and aggravate his condition.

[12] The children reside primarily with the respondent and have defined contact with the applicant. The prevailing parenting regime has existed since approximately December 2014, when the parties separated from each other. Changes have occurred to the applicant's contact rights over the years but the children's primary residence with the respondent has remained constant. The respondent alleges that the children are stable

and settled in the parties' homes in terms of the prevailing parental arrangements, environments and routines.

[13] The respondent, a teacher by profession, contends that the children are bright, mature, happy, healthy and well-adjusted. They cope at school and perform academically to the best of their respective abilities. The children participate in soccer and extra lessons.

[14] Both parties referred me to the background to this matter. I deal briefly therewith hereunder.

[15] Divorce proceedings incepted during December 2014. Both parties sought primary residence of the children. Costly and acrimonious litigation followed for some three years thereafter, until November 2017, when the parties divorced.

[16] Four courts ordered that the children reside primarily with the respondent and the applicant exercise defined contact. The orders were handed down by the rule 43 courts during March 2015, April 2015 and 9 December 2016, and by the divorce court on 24 November 2017. The latter included the settlement concluded between the parties upon their divorce.

[17] Various professionals recommended that primary residence of the children be with the respondent.

[18] The family advocate recommended in October 2015 and August 2018 that interim primary residence of the children remain with the respondent. In addition, the family advocate endorsed the settlement.

[19] M S underwent evaluation, counselling and play therapy with an educational psychologist, Tracy Naude ('Naude'), from May to December 2014 and from January to October 2015. During January 2016, Naude recommenced play therapy with M S.

[20] As from December 2014 to January 2015, educational psychologist Lynn Holmes, mediated the parties' disputes in the divorce action. The educational psychologist recommended that the children reside primarily with the respondent with defined contact to be exercised by the applicant. During February 2015, the applicant counter-applied in terms of rule 43 for an order in such terms.

[21] During April 2015, the applicant furnished a report from an additional educational psychologist, one Karen Joubert, dated February 2015.

[22] In May 2015, the parties attended separate sessions with counselling psychologist Lisa Kalmeyer, to organise therapy for E S.

[23] During October 2015, the family advocate furnished the first family advocate's report ('the first family advocate report'), stating *inter alia* that:

23.1 The father sought primary residence of the children;

23.2 The family advocate's opinion was that to move the children from the mother's care would destabilise them;

23.3 '(S)hare(d) residence is not an option because for it to work, it requires both parties to co-operate with each other and work together as parents;'

23.4 Primary residence of the children should vest with the mother and the father exercise defined contact.

[24] In November 2015, the family advocate furnished the second report ('the second family advocate's report'). It reflected that subsequent to publication of the first family advocate's report, the applicant contacted the family advocate. The respondent was not party to the applicant's contact. Notwithstanding, the family advocate persisted with the recommended that primary residence vest in the respondent and defined contact be exercised by the applicant.

[25] In March 2017, the applicant withdrew his claim for primary residence of the children in the trial action, agreeing that the children's best interests were served by them residing primarily with the respondent and him exercising defined contact to the children.

[26] The settlement provided that primary residence of the children vest with the respondent with defined contact to the applicant.

[27] Shortly thereafter, however, the applicant raised disputes in respect of the children's residence and contact arrangements. The applicant withheld the children from the respondent during her holiday contact, refusing to return the children notwithstanding the SAPS' intervention.

[28] Subsequently, the applicant proposed mediation with a professional, one Marissa Galloway-Bailey, with whom he had already communicated. During March to July 2018, the parties underwent mediation with Galloway-Bailey, the purpose of which was to bring clarity to certain limited issues not to vary the settlement. During July 2018, the parties concluded a memorandum of understanding, specifically recording that the memorandum did 'not vary or amend the (divorce order)'.

[29] Galloway-Bailey terminated the mediation in August 2018, reporting that a reasonable ‘mutually agreeable resolution in an informed, collaborative and consensual manner’ was unlikely.

[30] On 12 December 2018, the applicant instituted the first urgent application, (the ‘December 2018 application’) claiming substantially similar relief to that sought before me, including the appointment of a specified social worker,

[31] The respondent alleged that insufficient time had elapsed since the granting of the divorce and that circumstances had not changed in the interim. The applicant removed the matter from the roll without tendering the respondent’s wasted costs.

[32] The applicant, on 16 January 2020 or thereabouts, brought an application in the Booysens Children’s Court for leave to travel overseas with the children and to renew their passports. The magistrate referred the application to the family advocate’s office.

[33] The children’s court dismissed the application for lack of jurisdiction on 3 August 2020. Notwithstanding, the applicant prevailed upon the family advocate to investigate the issues of ‘custody/access/guardianship’, as opposed to the claims made in the children’s court application referred to the family advocate. Although the respondent attended an appointment with the family advocate, the investigation, as I understand the papers, did not proceed further.

[34] The December 2018 application remained extant until the applicant withdrew it by notice on 12 January 2021. The applicant delivered the current application on 22 January 2021.

[35] At the commencement of the hearing before me, I raised the outstanding maintenance issues alleged by the respondent. According to the respondent, the applicant short pays the monthly maintenance and pleads poverty.

[36] On two occasions that the outstanding maintenance issues came before the maintenance court, the applicant on both occasions paid the outstanding maintenance on the morning of the trial. The applicant argued that the maintenance issues were not raised on the papers, were not relevant to the issues before me and ought to be determined by the maintenance court and not by me. I refused to be mollified and the applicant tendered to pay the outstanding maintenance prior to my dealing with the applicant's case before me.

[37] The applicant relied primarily on four factors for Robinson's appointment, namely:

37.1 The respondent's alleged corporal punishment of the children;

37.2 The emotional outbursts displayed by the children, particularly M S, during 2020, prior to the commencement of this application;

37.3 The children's alleged unhappiness with the respondent and their wish to spend more time with the applicant;

37.4 The two 'time capsule' exercises performed by the applicant with the children, allegedly using know-how gleaned by the applicant from friends;

37.5 The respondent's allegations levelled against the applicant for the first time in her correspondence of February 2021, including allegations of the applicant punishing the children severely;

37.6 The respondent's alleged failure to make decisions facilitating the best interests of the children in her capacity as a co-parent. The example that the applicant proffers is the respondent's failure to permit the children to travel with him to New Zealand during December 2019, and to consent to the renewal of the children's passports.

[38] The applicant contends that a forensic investigation was not done on the family dynamic and that the children's wishes were not heard at the time of the parties' divorce. However, by reason of the children's increase in age and maturity in the interim, they are able to speak for themselves and make their wishes known to the applicant. Moreover, the applicant argues that this application articulates the children's wishes.

[39] It is common cause that the applicant contacted Robinson twice. The applicant disputes at this stage that he sought advice from Robinson. The latter furnished an affidavit in the proceedings confirming that she read the notice of motion and applicant's founding affidavit in the application. Thus, the respondent contends that Robinson's neutrality is tainted and opposes Robinson's appointment. The respondent submits that if I consider it appropriate to order an investigation, that it should be done by the family advocate.

[40] The respondent raised various issues in respect of the applicant's relationship with the children, namely that:

40.1 The applicant discusses the details of the parties' disputes with the children;

40.2 The latter show stress and anxiety when confronted with the parties' disputes;

40.3 The applicant manipulates the children, coaching them on what they should say and recording specifically structured conversations with them in an attempt to substantiate his allegations concerning the children;

40.4 The applicant permits the children excessive internet exposure; and

40.5 The children allegedly sleep with the applicant in his bed whilst exercising overnight contact with him.

[41] Notwithstanding the respondent's averment that the applicant's alleged inappropriate conduct has a 'negative, emotional and psychological effect' on the children, the respondent wants the children to have a positive relationship with their father. The respondent's stance is that the children are not in physical danger whilst in the applicant's presence and hence she does not seek to vary the children's contact with the applicant.

[42] I turn to consider the factors upon which the applicant placed reliance in this application.

[43] As regards the alleged corporal punishment, the applicant relied on only one alleged occurrence, during February 2021. The respondent denied the allegations and denied ever physically abusing or harming the children in any manner.

[44] The applicant had no personal knowledge of the respondent's alleged corporal punishment of the children and relied upon reports made to him by the children.

[45] The respondent furnished an explanation of the alleged incident, explaining that the children were playing with staffs. Their game became rough as a result of which the

respondent was forced to intervene in order to separate the children before one or both of them sustained an injury from their play.

[46] The respondent's explanation of the incident was credible and feasible in the circumstances alluded to be her. There was no reason not to accept the respondent's explanation of what occurred, particularly as the children's statements were not wholly reliable and the transcripts of the recorded conversations between the applicant and the children were not sufficiently reliable to serve as a basis to grant the relief sought by the applicant.

[47] It was common cause that the respondent never inflicted corporal punishment on the children or abused or harmed them in any manner prior to the alleged incident during February 2021. There was no threat that the respondent would do so afterwards or in the future. Accordingly, at the time of the alleged incident, this application, (which incepted on 25 January 2021), was pending and the respondent was well aware that her conduct was under scrutiny.

[48] The probabilities of the respondent, (who had not inflicted corporal punishment on the children previously), doing so in the face of the pending legal proceedings was minimal. Moreover, the respondent, a teacher of many years standing, was well-aware of what she may and may not do in respect of children, including the prohibition on corporal punishment of children.

[49] The transcripts of the applicant's recorded conversations on 4 February 2021 with M S[1] and with E S[2] reflect the children's respective reports of the respondent's alleged corporal punishment. Despite the children raising different topics through the

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1 008-39 and 008-40.
2 008-35.

conversation, the applicant persists in referring the children repeatedly to the respondent's alleged actions and to previous conversations held with the children and statements made by them, thus prompting the children to furnish a particular response.

[50] The children's alleged reports were not made in a neutral and controlled environment and do not reveal spontaneous and reliable portrayals of corporal punishment but conversations constructed by the applicant with the aim of eliciting a particular response, namely that the respondent hit the children. In short, the transcripts hold no probative value.

[51] In addition, M S stated to the applicant that the applicant 'hits harder'. The applicant's response was to query if he ever smacked the children to which M S responded in the negative. The exchange reflects that M S's statements regarding the applicant hitting the children were untrue. That being the case it is possible that the statements of the respondent hitting the children were equally untrue.

[52] Similarly, the exchange negated the respondent's allegations of the applicant hitting the children, relied upon by the applicant inter alia for Robinson's appointment.

[53] As regards the respondent's refusal to give the undertaking sought by the applicant, the respondent denied the alleged corporal punishment and explained that if she had given the undertaking, it would have been used against her by the applicant in the future and would have resulted in adverse consequences to her. In the light of the long history of acrimonious litigation between the parties, the applicant's refusal of the undertaking cannot be found to be unreasonable or serve as an indication that the respondent did inflict corporal punishment on the children.

[54] Moreover, the applicant relied upon a single alleged incident of corporal punishment that was over with no prospect of a repeat of the alleged incident. It is a longstanding principle that an interdict will not be granted in respect of a single breach of a right where there is no reasonable prospect of a repeat thereof.[3]

[55] In the circumstances, I cannot find that the applicant established *prima facie* although open to some doubt[4] a breach by the respondent of the children's rights by inflicting corporal punishment on them. The respondent's explanation throws serious doubt on the applicant's averments such that the applicant cannot obtain interim relief.

[56] Given that the applicant did not meet the requirements of an interim interdict that relief stands to be dismissed.

[57] In respect of the children's alleged unhappiness at spending time with the respondent and wishing to spend more time with the applicant as well as the children's 'more recent' emotional outbursts, especially those of M S, the applicant relied upon transcripts of his recorded telephone conversations with the children and the time capsule exercises.

[58] The transcript of the telephonic conversation between the applicant and M S on 27 October 2020 reflected that M S woke up as a result of E S, his younger brother, playing a prank on M S that upset him. Thereafter, the clock on M S's mobile telephone displayed the incorrect time causing M S to think he was going to be late for school.

[59] In so far as the transcript included M S's statements to the effect that he could not wait another week and was looking for a court date, the statements are ambiguous and

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3 *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 SCA at 347E-F.

4 *Webster v Mitchell* 1948 (1) SA 1186 (W).

both are capable of a number of different meanings. The context in which M S made the statements was the irritation, frustration and anger caused to him by E S earlier, his distress at possibly being late for school and his malfunctioning mobile telephone. No evidential weight can be ascribed to M S's statements given inter alia, the ambiguous nature thereof and M S's emotional distress in particular at the time that he made the statements.

[60] As to M S's statement that he was looking for a court date, only the December 2018 application was pending at that stage. However, M S's statement regarding the court date suggested that he was aware of pending litigation between his parents, which is troubling indeed.

[61] The children should not know of nor be made aware of disputes, pending litigation and court proceedings between the parties. Such issues should not be discussed by either parent with the children. The latter should not be involved in such matters by either parent. It is not in the children's best interests for a parent to discuss with or make the children aware of such matters. A parent who does so is not a parent who *bona fide* cares for and is concerned about the children. Such conduct reflects poorly on the relevant parent.

[62] The children are young and impressionable. They undoubtedly love both parents and should be allowed to benefit from their respective relationships with each parent, without one parent denigrating the other or questioning them about the conduct of the other parent.

[63] Whilst the transcript reflected anger, frustration and distress on M S's part, the transcript did not demonstrate poor parenting by the respondent or adverse circumstances in the respondent's household. If anything, the transcript reflected a child

who experienced an adverse start to his day, the effect of an unfortunate combination of a mischievous younger brother and an unreliable mobile telephone.

[64] Nothing in the transcript indicates a reason to appoint an expert to investigate the children's care or residence regime or to consider a potential variation of the existing regime.

[65] The applicant administered the 'time capsule' exercises ('exercises'), on the advice of friends who are school teachers, as a means to encourage the children to articulate their wishes. As a result, each child wrote a letter in response to the question 'What would I like to see change?' M S said that he wanted 'equal time with my parents' and E S wrote 'I want to have week week with my mother and my father'.

[66] The applicant is not a neutral third party in respect of this matter. Nor is the applicant a trained and experienced psychologist or an expert in such matters. The children did not perform the exercises in a controlled and neutral environment free of outside influences. These factors, individually and in combination, all impact adversely upon the reliability of the outcome of the exercises and serve to reduce the weight that can be attached to the children's responses.

[67] The applicant denied that he influenced the children regarding the content of their letters. Suffice it to state that it is peculiar indeed that the children's alleged wishes, effectively for shared residence with both parents, mirrors one of the options sought by the applicant in these proceedings. M S is eleven and E S is nine years of age at this stage but they would have been younger when they wrote the letters. The extant arrangement is that the children spend five nights less with the applicant than they do with the respondent over a 14-day period. In the circumstances, the question arises as

to how such young children are aware of arrangements other than that experienced by them and amounting to shared residence.

[68] It is highly improbable that both children, wholly independently of all influences, would have had independent knowledge of ‘equal time’ or ‘week week’ with each parent. Nor is it likely that they would have furnished such responses without prompting, be it directly or indirectly, in some or other manner.

[69] In addition, the children’s alleged wishes stand contrary to the applicant’s allegation that they are unhappy spending time with the respondent. Yet the children’s alleged wishes dovetail almost precisely with one of the applicant’s prayers in this application. This is in circumstances where the respondent contends that the applicant informed the children and they in turn informed her, that the applicant sought shared residence of the children.

[70] In the circumstances, I am doubtful indeed that the children’s alleged wishes as conveyed in the time capsule exercises are a reliable indication of their true choices in this regard. The results of the children’s exercises are unreliable and do not suffice as evidence of the children’s wishes or their best interests.

[71] In any event, the children’s wishes, if reliable, are only one factor in determining the parenting arrangement that best facilitates the children’s interests.

[72] As regards the children, particularly M S’s, emotional outbursts relied upon by the applicant, the respondent referred to the difficulties caused to the parties and the children pursuant to the Covid-19 pandemic and the resultant ‘lockdowns’. Longstanding contact arrangements had to be changed resulting in confusion and distress to the children especially M S. Schooling arrangements changed and changed again with the children

being home-schooled online, then attending school on alternate weeks and at one stage attending school in weeks that the sibling did home schooling.

[73] The enforced absence of interaction and recreation time with their friends, the cessation of school and sporting activities as well as uncertainty, concern at the pandemic and its potential ramifications all contributed significantly to the frustration and emotional turmoil experienced by the children as well as the parties.

[74] It is to be expected that the children's emotional and mental well-being was tested as a result of the changing demands made upon them by the pandemic. Adverse reactions by the children, particularly M S, to the prevailing circumstances of the time should, in my view, have been expected by both parties.

[75] It is entirely probable that the children's emotional outbursts relied upon by the applicant were a reaction to the changes wrought by the pandemic referred to afore.

[76] In the circumstances, I cannot find that the outbursts are indicative of the children's unhappiness at living primarily with the respondent or in her home, or of anything wrong in the respondent's household or her manner of caring for the children.

[77] In respect of the respondent's alleged failure to make decisions in the best interests of the children, the issue of the children travelling to New Zealand is moot and the circumstances thereof do not require further investigation.

[78] Regrettably, there is a marked absence of reasonable cooperation and communication by both parties in this matter. However, the applicant's continuous resorting to litigation at enormous cost to both parties but particularly the respondent, his apparent intent on continuing with such litigation given the content of the notice of motion,

coupled with his failure to pay the children's maintenance in terms of the court order do not augur well as a platform for reasonable cooperation between the parties.

[79] Suffice it to state, at this stage, that the children appear to be settled and well-adjusted in the primary residence of the respondent whilst exercising defined contact to the applicant.

[80] There is no basis before me that justifies the appointment of an expert to investigate potential changes to the existing parenting arrangements or to grant the balance of the relief sought by the applicant.

[81] By reason of the aforementioned, I grant the following order:

81.1 The application is dismissed with costs, such costs to include the costs of the applicant's supplementary affidavit delivered on 22 July 2021.

A A CRUTCHFIELD SC
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 14 December 2021.

COUNSEL FOR THE APPLICANT:	Mr Bollo.
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COUNSEL FOR RESPONDENT:	Ms C Gordon.
INSTRUCTED BY:	Craig Baillie Attorneys.
DATE OF THE HEARING:	28 July 2021.
DATE OF JUDGMENT:	14 December 2021.