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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 34635/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

Date

Signature

In the matter of:

W B

Applicant

And

L B

Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives via email and upload to the CaseLines file in this matter. The date and time of hand down is deemed to be 10:00 on 28 April 2022.

Bester AJ

- [1] The applicant and the respondent are the divorced parents of a seven-year-old girl, L[...]. Upon their divorce on 22 January 2021, a settlement agreement between them was made an order of court. It included arrangements regarding the applicant's contact with L[...], whose primary residence, they agreed, would be with the respondent, her mother.
- [2] The applicant, L[...]'s father, seeks an urgent order that the respondent is in contempt of the court order, because she has unilaterally changed the frequency, duration and manner of the applicant's contact with L[...]. He seeks her committal to prison for a period of 30 days, suspended on condition that the respondent complies with the provisions of the order. In addition, he seeks that the issues of L[...]'s best interests with regard to her primary residency, care and contact be referred to the family advocate for investigation.
- [3] Due to accusations of neglect by both parents, I concluded that the matter should proceed on an urgent basis.
- [4] The contact arrangements are set out in clause 4.3 of the settlement agreement as follows:

- “4.3.1 Every alternative Wednesday from 17h00, when the Defendant will collect L[...] from the Plaintiff's residence until the Thursday morning when he will drop L[...] off at school, thus a one-night sleep over. This will be applicable on non-weekend contact weeks.
- 4.3.2 Every alternative weekend from Friday afternoon after school, when the Defendant will collect L[...] from school until Monday morning, when he will drop L[...] off at school.
- 4.3.3 Every alternate public holiday from 17h00 the day preceding the public holiday to 18h00 on such public holiday, except those public holidays falling on a Friday or Monday, which public holiday shall be deemed to form part of the usual weekend contact;
- 4.3.4 reasonable telephone/Skype/WhatsApp contact with L[...];
- 4.3.5 both parties shall spend at least 2 hours with L[...] on her birthday, if said birthday falls during the week, and for half of the day if the birthday falls on the weekend;
- 4.3.6 Father's Day from 17h00 the day preceding father's day on the understanding that L[...] shall spend mother's day with the plaintiff;
- 4.3.7 on the defendant's birthday from 17H00 on the day preceding his birthday until 19h30 on the day of his birthday on the understanding will spend the day with the plaintiff on the plaintiff's birthday;
- 4.3.8 it is agreed that the parties shall each be entitled to have L[...] with him/her for the entire duration of half of every school holiday period (including mid-term breaks), which is to be reckoned on the basis that L[...] spends an equal amount of time with each party, provided that Christmas and the Easter long weekend rotates between the parties, with the Christmas period in 2020 to start with the Plaintiff.”

- [5] Once a settlement agreement has been made an order of court, it is an order like any other.¹ It changes the terms of the settlement agreement to an enforceable court order, which may be enforced with contempt proceedings, or any other proceedings permitted by the nature of the order.²
- [6] It is now settled that the applicant must prove, beyond reasonable doubt, the existence of the order, that it has been served on the respondent or that the respondent has notice thereof, that the respondent has not complied with the order, and that this was done wilfully and *mala fide*.³ Once the applicant has proved the order, service or notice and non-compliance, wilfulness and *mala fides* are assumed and the respondent bears an evidential burden to advance evidence that establishes a reasonable doubt as to whether non-compliance is/was wilful and *mala fide*.⁴ Should she fail to do so, contempt will be established beyond reasonable doubt.
- [7] It is common cause that the order exists, and that the respondent had known of its existence, and the contents thereof, since the time that it had been made. It is also common cause that the respondent breached the order. In recent months, the respondent has refused to allow the applicant contact with L[...] as stipulated in clause 4.3 of the order – she currently insist that he only has contact with L[...] for a few hours at a time, under supervision of a social worker, with no sleep over.

¹ *Eke v Parsons* 2016 (3) SA 37 (CC) in [29].

² *Eke supra* in [31].

³ *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) in [42]; *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) in [36]; *Secretary, Judicial Commission v Zuma* 2021 (5) SA 327 (CC) in [37].

⁴ *Fakie supra*; *Pheko supra*.

- [8] In the circumstances, it need only be considered whether the respondent has advanced evidence that establishes a reasonable doubt as to whether she acted wilfully and *mala fide*.
- [9] The respondent claims that she did not act *mala fide*, because her insistence on a deviation of the contact arrangements was born of a desire to protect L[...] against the applicant's neglect, and potential physical harm.
- [10] The respondent also has a minor son, P[...], thirteen years old, from a previous relationship. The settlement agreement that was made an order of court awarded rights of contact between the applicant and P[...] on the same terms as with L[...], although the applicant does not have any other parental rights or responsibilities in respect of him. Sometime during 2021 P[...] was no longer interested in contact with the applicant, and neither party is pursuing this aspect.
- [11] L[...]’s and P[...]’s domestic circumstances are far from ideal. Both the applicant and the respondent admit to regular drug and alcohol abuse until recently. This includes the use of cocaine. Accusations about emotional and economic abuse, and, more recently, physical abuse, against the applicant, have ended up in the domestic violence court, and remain live issues between the parties. Lack of economic resources, and the applicant's failure to keep up to date with maintenance payments, further add to the unfortunate mix of circumstances in which these two children are brought up.

- [12] As is common in these circumstances, the parties disagree on the facts of much of their interactions, which have not been centred only around the children. In this application, the parties have spent pages and pages throwing all manner of sordid details from the past year and a half at one another and, to be fair, admitting to a large extent their own part therein. Recriminations and blame is slung far and wide by both, but it is difficult to find a clear narrative of the true facts: who did what first; who initiated drug and alcohol fuelled events; who initiated sexual intercourse subsequent to the divorce, and why; whose sexual conduct is to be frowned upon or not; whether this impacted on the children; who drove with L[...] not fastened in a car seat; who failed to provide her with a lunchbox for school – the list goes on, at all levels of seriousness.
- [13] In August 2021 there appears to have been a turning point in the life of the respondent. After a failed suicide attempt, she took steps to overcome her addictions and underwent drug and alcohol rehabilitation. From her narrative, it appears that this had also caused her to re-evaluate the circumstances in which the children are being brought up.
- [14] It suffices to pick up the trail in mid-January of this year. On 15 January 2021 the applicant's efforts to arrange with the respondent to pick up L[...] for the weekend, remained ignored. After correspondence from the applicant's attorney to the respondent's then attorney, the respondent's attorney advised on 21 January 2021 that the applicant may see L[...] on the weekend, but that he could pick her up only at 19h00 instead of 13h00 on the Friday, and that he must return her by 10h00 on

the Sunday instead of the Monday morning. Further exchanges ensured that L[...]’s return was agreed to be as per the settlement agreement, being Monday morning.

[15] On 3 February 2022 the respondent’s attorneys wrote to the applicant’s attorneys, accusing the applicant of neglecting L[...], citing instances of failing to wash her hair and teeth, failure to provide her with adequate sun protection, failure to secure her properly in his vehicle whilst driving and the like. The proposal was then presented that the applicant only see L[...] under supervision while the family advocate investigates what is in L[...]’s best interest, on the basis that the applicant has a history of substance abuse. As pointed out, this was equally true for the respondent; however, at that stage, she contends, she had stopped the substance abuse.

[16] The next day the applicant’s attorneys responded to these allegations, and the applicant sought to arrange to pick L[...] up for the weekend. The respondent, however, refused to let L[...] exercise contact with him at all. The reason for this is not clear.

[17] On 9 February 2022, through the actions of the parties’ attorneys, it was agreed that the applicant will have contact with L[...] as per the court order, with no need for supervision, on condition that he supplies drug tests every Friday morning before he collects L[...], with the respondent providing reciprocal tests on the Mondays when L[...] is returned to her.

- [18] On 11 February 2022, after supplying a negative drug test, the applicant's attorneys sought confirmation that he may collect L[...] at school at 13h00. On the same day, the applicant's attorney was contacted by the investigating officer at Morningside SAPS, regarding a complaint that he had violated a protection order obtained against him by the respondent. On 14 February 2022 he attended the SAPS with his attorney, where he was provided with a warning statement.
- [19] After L[...] had slept over at the applicant's home on Wednesday 16 February 2022, the respondent alleged that L[...] told her that the applicant did not bath her, didn't do her homework with her, sent her lunch wrapped in tin foil, failed to send water with her to school and transported her without a car seat.
- [20] Shortly thereafter L[...] contracted Covid-19 and was hospitalised. Thankfully she recovered and could return home after a few days. However, the bickering between the parties continued.
- [21] On 22 March 2022 the respondent's current attorneys addressed a letter to the applicant's attorneys, refusing any further unsupervised contact and all sleep over, on the basis of the applicant's drug addiction. This led to the current application.
- [22] There is no support for the contention that the applicant is a physical danger to L [...], and Mr Coovadia wisely refrained from relying on the point in argument.
- [23] The respondent's refusal of contact with L [...], on the basis of the applicant's addiction, has lost much of its force. The applicant has submitted weekly negative drug test reports since the issue was raised by the respondent.

- [24] The respondent's case regarding her concern for L[...]’s well-being when in the care of the applicant has thus been reduced to complaints that he allows too much sugary drinks, cake and popcorn; he allows “piggy-evenings”, when he allows her not to bath; there are instances where her hair and her teeth were not brushed; he failed to fasten her in a car seat; and he did not properly attend to her lunchbox.
- [25] Although these matters should not be trivialised, they do not entitle the respondent to disregard a court order. She does not fully explain why she had not taken steps to have the issues she is concerned about investigated with a view to vary the court order. However, I conclude that she has set out sufficient facts to prevent the conclusion, beyond reasonable doubt, that she acted *mala fide*. Being somewhat overzealous in her newfound determination to create a better environment for L[...] does not render her conduct *mala fide*.
- [26] Both parents seem to have resolved to move beyond their addictions for the sake of their daughter, and this should be the focus of their interaction with one another.
- [27] Although I conclude that the applicant has not proven beyond reasonable doubt that the respondent is in contempt of court, the applicant has, in my view, proven on a balance of probabilities, that the respondent has unilaterally sought to change the basis of the applicant's access to L[...]; and that there is good cause to request the office of the family advocate to investigate whether any changes in the care and access to L[...] are necessary. In the circumstances, the applicant should succeed at least partially in this application, and an appropriate order to ensure

compliance and provide for a process to review the arrangements regarding contact is appropriate.⁵ I find no basis to have the issue of primary residence revisited.

[28] Given the financial circumstances of the individuals involved, and with particular reference to the ongoing issues around maintenance payments and both parents pleading insufficient financial resources, I deem it appropriate to make no order as to costs. Mr Coovadia in any event informed me that the respondent's legal representatives are acting *pro bono*.

[29] In her answering affidavit, the respondent took issue with the applicant's attorney's conduct, who posted on the firm's Facebook page, that the firm was busy with this matter. Although the matter is not specifically identified, a page from the application appears in the post, for which L[...]s name is illegible. This conduct, the respondent contends, should be met with a cost order *de bonis propriis*.

[30] However, this conduct is not directly related to the application, and I therefore do not consider it appropriate to consider the Facebook post when deciding the issue of costs. The respondent may of course avail herself of the appropriate machinery to complain about the attorney's conduct with the Legal Practice Council if she should deem it appropriate.

[31] In the result I make the following order:

⁵ *Fakie supra* in [42] (e); *Eke supra* in [24].

- (1) The respondent is ordered to immediately restore the applicant's contact with L[...] to accord with the court order of 22 January 2021.
- (2) The issue of the best interests of L[...] A[...] B[...], with regard to care and contact, is referred to the Office of the Family Advocate for investigation and a report, as soon as is reasonably possible.
- (3) After the Family Advocate's report has been filed, the parties are to consider whether the report requires a variation of the contents of the court order of 22 January 2021, and, if they deem it appropriate, may approach this Court for an appropriate variation, whether by agreement or otherwise, on the same papers, supplemented as necessary.
- (4) No order is made as to costs.

Andy Bester
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Date of hearing: 5 April 2022 and 8 April 2022

Date of judgment: 28 April 2022

Appearance for the Applicant: Ms L Perel

Instructed by:

Els0 Viljoen & Associates Inc

Counsel for the Respondent:

Adv M Coovadia

Instructed by:

Snaid & Morris Inc.