REPUBLIC OF SOUTH AFRICA

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

Case No: 7389/16

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

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SIGNATURE **DATE**

In the matter between :

HILLIER, DAENA Applicant

and

MANNERING, JAMES ERNEST Respondent

In Re :

MANNERING, JAMES ERNEST Applicant

and

HILLIER, DAENA Respondent

JUDGMENT

STRYDOM J

[1] This matter involves a child born out of wedlock. This matter has a long history and the parties are engaged in litigation since March 2016.

[2] The minor child (Chloe) was born on 6 January 2015 at a time when the parties were living together. On or about 8 February 2016, the applicant moved out of the joint home with Chloe.

[3] During or about 1 March 2016, the respondent launched an urgent application seeking interim primary care of Chloe in Part A of a notice of motion pending the decision of Part B in which he sought orders declaring the parties to be the holders of co-parental responsibilities and rights and primary care of Chloe subject to the applicant's right of reasonable contact. This application was opposed. When Part A of the urgent application was heard it was struck off the roll for lack of urgency and the respondent was ordered to pay the costs occasioned thereby.

[4] During or about April 2018, the applicant suffered a mental episode and the minor child was, by consent, placed in the care of the respondent. This status *quo* was maintained until about August 2020 when the applicant opposed the respondent's relocation to Benoni with Chloe and demanded that Chloe be returned to her primary care.

[5] During the first part of 2021, the parties were continuously at loggerheads over Chloe's attendance at the Benoni Nursery School.

[6] During or about 12 June 2021, the respondent's fiancé tested positive for Covid-19 whilst Chloe was visiting the applicant. The applicant refused to return Chloe to the respondent and an argument ensued between the parties when

the self-isolation period would lapse after a child living with the respondent's fiancé also tested positive for Covid. The respondent was of the view that the isolation period had lapsed and that Chloe should be returned. The applicant however disputed that and refused to return Chloe and challenged the respondent to approach court on an urgent basis.

[7] On or about 29 June 2021, the respondent then launched an urgent interdict wherein he, *inter alia*, asked for the immediate return of Chloe to his primary care. He further asked that pending the finalisation of the main application launched in April 2016, the applicant be interdicted and restrained from removing or attempting to remove the minor child from the respondent's primary care and an interdict preventing the applicant from upsetting or attempting to upset the status quo pertaining to the minor child's primary care and schooling. A costs order was sought against the applicant.

[8] The urgent application was set down for 6 July 2021 but two days before the hearing of the matter, the applicant made a "with prejudice" tender that the applicant can collect Chloe from the respondent on 5 July 2021. It was further contended that the respondent's urgent application be withdrawn with costs to be reserved to be argued at the hearing of Part B of the respondent's main application.

[9] This tender was not accepted and the matter proceeded to the urgent court and was heard by Judge Makume.

[10] As Chloe was now back with the respondent, the urgency has fallen away but Judge Makume decided that the matter should be referred to case

management to resolve their differences. An order was made in the following terms:

10.1 The matter is removed from the urgent roll;

10.2 The matter is referred for case management;

10.3 The costs are reserved.

[11] After this order was made, the matter was then in fact referred to case management and presided over by Judge Yacoob. At some stage an interim order was made by her but ultimately the parties agreed to a parenting plan concluded between them on 10 November 2021. On 15 November 2021, Judge Yacoob made an order that the parenting plan concluded between the parties be made an Order of Court. No costs order was made. This Court Order finally dealt with the opposed application of April 2016 and one would have hoped that it also finally dealt with the outstanding reserved costs order.

[12] This however was not the case and on 3 December 2021 the applicant launched this substantive application for a costs order on an attorney and client scale pertaining to the reserved costs of the urgent application which was heard on 6 July 2021. A full set of affidavits were exchanged and both parties gave notice that punitive costs orders would be sought. From the respondent's side it was indicated that he will be seeking a punitive costs order against the applicant together with her legal practitioners of record, Vermeulen Attorney, on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved *de bonis propriis*.

[13] This court now has to decide which party should be held responsible for the costs of the urgent application and whether a punitive costs order should be made against any party.

[14] It should be noted that it is unclear to this court why a further substantive application had to be launched to ascertain who should be responsible for the reserved costs as the matter could have been set down on the existing papers for decision of this cost issue. The parties however now seek punitive costs orders and the court will consider the application on its merits. Moreover, it is the version of the respondent that what has transpired subsequently indicated that the cost issue was part of the bigger settlement when the parties agreed to a parenting plan. This was denied by the applicant.

[15] Considering the order of Yacoob J and the correspondence, I am not convinced that the settlement pertaining to the parenting plan disposed of the reserved costs of the urgent application.

[16] To consider the current application the starting point would be what cost order should be made pertaining to the urgent application dated 6 July 2021?

[17] The status *quo* since 19 April 2018 was that Chloe was in the primary care of the respondent. She visited and stayed with the applicant from time to time but there can be no doubt that her primary residence was with the respondent and she attended school near the respondent's residence.

[18] After a visit, Chloe should have been returned on 13 June 2021, but as a result of Covid contracted by two people in the respondent's household, the applicant decided not to return her. The last date on which a person staying with the

respondent got Covid was 15 June 2021 and by 30 June, approximately 15 days later, Chloe was still not yet returned. It is understandable that under those circumstances the respondent, who was challenged to do so, launched the urgent application. On a reading of the papers it also appears that the applicant was, besides the Covid issue, dissatisfied with the school that Chloe attended. She previously interfered at the school and threatened to remove Chloe from the respondent's primary care with the assistance of the South African Police Services.

[19] On 28 June 2021, the applicant intimated to the respondent that Chloe would not return to Benoni Nursery School and that she will take control of Chloe's future and that the respondent could take her to court if he wanted to do so.

[20] All this in my view justified the filing of the urgent application.

[21] The tender two days before the hearing that Chloe can be returned made no mention that the applicant would not interfere with Chloe's schooling or would not do anything to upset Chloe's primary care with the respondent.

[22] Accordingly, I am of the view that after the tender for the return of Chloe, the respondent was entitled to leave the matter on the urgent roll to obtain the other interim relief which was sought. When the matter was heard the court clearly could ascertain that the parties have various differences which should be resolved. For that reason, the matter was referred to case management which ultimately culminated in the finalisation of the dispute involving Chloe's primary care and schooling.

[23] Also important, for a consideration which party should be held responsible for the cost of the urgent application, is to consider what relief the applicant was seeking in her answering affidavit. She asked for an order that she be awarded primary residence and that the respondent be awarded reasonable right of contact. This was in direct contrast with the status quo which prevailed at that time. She also asked for a shared residency order. Fact is there were many unresolved issues. To suggest that the parties could have resolved their differences there and then with the assistance of their respective attorneys was optimistic. The correspondence between the parties themselves indicated that the intervention of a court was necessary. It is thus not surprising that the court referred the matter for case management, which turned out to be a fruitful exercise.

[24] It is indeed so that the urgency to some extent fell away after the tender was made for the return of Chloe. A tender was however not made for costs of the application up to that stage when the tender was made. Considering the fact that the court is dealing with parents who believe that they act in the best interests of the child, I am of the view that the appropriate costs order pertaining to the urgent application should be that each party should pay their own costs. The mere fact that the applicant tendered the return of Chloe only on 5 July 2021, which is a period well outside the Covid quarantine period, is indicative that the applicant must have realised that she unlawfully refused the return of Chloe during or about 30 June 2021. Although the situation changed after the tender, the respondent was entitled to pursue the other relief he was seeking. When the court decided that the case management route was required the need to press for the other relief also fell away. Accordingly, the

reserved costs of 6 July 2021 is ordered to be that each party pays his or her own cost.

[25] As the costs of the urgent application was reserved the applicant was entitled to have this outstanding issue to be decided by a court. As stated, the settlement of the main application unfortunately did not deal with the reserved costs. The awarding of cost of the substantive application for the cost of the urgent application follow the result unless there are special circumstances to order differently. More extensive costs were now incurred in a full blown substantive application to obtain a decision in this regard. Punitive costs are sought by both parties.

[26] The relief the applicant is seeking is that the respondent is ordered to pay the costs of the urgent application on an attorney and client scale. The court already found that each party should be responsible for his or her own costs of the urgent application. In my view, there are no special circumstances present in this matter to move this court to exercise its discretion to deviate from the principle that costs should follow the result. Accordingly, the applicant should be ordered to pay the cost of this application. In my view, the respondent did not make out a case for a punitive cost order. The reason being that the reserved costs previously remained undecided and was only now decided.

[27] The following order is made:

27.1 The application of the applicant for the respondent to pay the cost of the urgent application heard of 6 July 2021 on an attorney and client scale is dismissed with costs.

27.2 The parties are to each bear their costs in relation to the urgent application dated 6 July 2021.

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RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of Hearing:	28 July 2022
Date of Judgment	23 August 2022

APPEARANCES

On behalf of the Applicant:	Ms. C. Mouton
Instructed by:	Vermeulen Attorneys
On behalf of the Respondent:	Adv. R. Andrews
Instructed by:	BMV Attorneys