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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
SIGNATURE	DATE: 4 January 2022

Case No: 20463 / 2021

In the matter between:

MV Applicant

and

WV Respondent

JUDGMENT

WILSON AJ:

1 The applicant, Ms. V, divorced the respondent, Mr. V, on 1 November 2019. The terms of the divorce were embodied in a settlement agreement ("the agreement"), which my sister Phahlane AJ made an order of court.

2 The agreement contained a series of provisions dealing with the residence of, and contact with, the parties' children, T (now aged 11) and X (now aged 4). The children were to reside with Ms. V. Mr. V would have various contact

rights. At the time the agreement was made an order of court, both parties resided in the greater Johannesburg area.

3 The arrangement appeared to work well until 27 November 2020, when Ms. V moved with T and X to the Eastern Cape. In April 2021, Ms. V moved with the children again, this time to Orania, in the Northern Cape, where Ms. V and the children now reside permanently with A, Ms. V's partner. There are disputes about when and whether Ms. V informed Mr. V of these relocations. These disputes cannot be resolved on the papers, but they are not, ultimately, material.

4 On 9 April 2021, T and X went to visit Mr. V, pursuant to the terms of the agreement. During that stay, T told Mr. V that he no longer wished to reside with Ms. V. T informed Mr. V of two incidents which triggered some concern about the children's welfare. The details of these incidents are not material, but I am satisfied that Mr. V's concerns were reasonable on the information he had at the time. Mr. V had also observed, during the children's visits with him, that the children were dirty, their clothes were worn, their nails were unclipped, and their hair was unkempt. Mr. V was naturally anxious to take steps to protect T and X.

5 Acting on T's apparent wish to remain with him, Mr. V informed Ms. V that he would not be returning the children to her at the end of their visit. On 19 April 2021, Mr. V approached the Children's Court. It is not clear from the papers what relief he sought, but nothing seems to have come of it. Ms. V tried to enlist the assistance of the police, who accompanied her to Mr. V's home at 23h00 on 18 April 2021. Mr. V convinced the police not to return the children

to Ms. V's care, apparently by referring to his attempt to activate the Children's Court.

6 On 24 April 2021, Ms. V brought an urgent application in this Court for the return of the children in compliance with the agreement. The application came before my brother Wright J. On 30 April 2021 he issued a *rule nisi*, directing that the children be returned to Ms. V pending a clinical psychologist's investigation of the children's best interests. The children were returned to Ms. V's care on the same day.

7 On 2 September 2021, my brother Meyer J extended the *rule nisi*, but amended it to require the production of a report by the Family Advocate dealing with where the children should in future reside.

8 The matter was then enrolled before me in the opposed motion court on 28 October 2021. The Family Advocate's report was filed just minutes before the matter was called at around 14h30. I could not, as a result, consider the matter on that day. I had not read the report, and would not have had the benefit of considered submissions on the report from the parties' representatives.

9 I asked the parties to come to an agreement on the further conduct of the matter, failing which I would have no option but to postpone the application *sine die*, and extend the *rule* until it was finalised or discharged. The parties submitted that the remaining issues before me were fairly straightforward. They contended that I could determine these matters on paper, without the necessity of a further hearing, unless I required additional oral argument.

10 The parties agreed the terms of a further conduct order, which I endorsed. Ms. V filed a further affidavit on 19 November 2021, to which Mr. V responded on 3 December 2021. Mr. V's counsel filed further written submissions on 17 December 2021. I am grateful to the parties and their legal representatives for their assistance, and in particular for framing and dealing with the issues on paper in so lucid and concise a manner as to render a further hearing unnecessary.

11 In the end, there were only two narrow issues placed before me.

12 The first relates to the manner of implementation of the Family Advocate's recommendations. In a well-reasoned and careful report, the Family Advocate recommends that the children's primary residence remains with Ms. V, subject to adjustments in Mr. V's contact rights. Both parties accept the Family Advocate's recommendations and are content to have them embodied in an order of court. In my view, that order should do no more than amend the agreement Phahlane AJ endorsed.

13 There is disagreement, though, on whether Ms. V ought to be required to bring the children from Orania to Johannesburg for their monthly visits with Mr. V. Ms. V objects to being ordered to do so, whereas Mr. V states that the Family Advocate's report requires that Ms. V be responsible for conveying the children to Johannesburg.

14 I do not think that the Family Advocate's report necessarily implies that Ms. V ought to be required to drive the children to Johannesburg every month. It states only that she "will be responsible for ensuring that the children visit [Mr. V] in Gauteng". That is something vaguer.

15 I do not, in any event, think that it is wise to place on Ms. V the onerous responsibility of traveling 2400 kilometres every month to drop the children off with Mr. V, and then collect them. Mr. and Ms. V ought to arrange for themselves how the visitation regime will work.

16 While no doubt well-intended, the Family Advocate's recommendation that Ms. V should "be responsible" for ensuring that T and X visit Mr. V in Johannesburg creates more problems than it solves. That condition will not form part of the order I make. Obviously, the default position should be that Mr. V ought to host the children at his residence. But how they get there, and whether a particular visit could be arranged somewhere other than Mr. V's residence, are surely things that the parties can and should arrange amongst themselves.

17 On the question of costs, Ms. V seeks the costs of the proceedings on the scale as between attorney and client. Mr. V contends that each party ought to pay their own costs.

18 Costs are of course in my discretion. But the usual approach – that costs follow the result – will seldom, in my view, be appropriate in family matters. Courts should avoid creating the impression that the determination of family disputes – especially those involving the care and residence of minor children – are about choosing who is the "better" parent, who was "right", or which of the parties has "won". That is inconsistent with the sensitivity, compassion and practical wisdom towards which courts are required to strive in these types of cases (see, for example, *McCall v McCall* 1994 (3) SA 201

(C) at 209B and *JDL v FNR* [2021] ZAGPJHC 135 (20 August 2021) at paragraph 24).

19 But this case is slightly different. In the agreement, Mr. V bound himself to a set of arrangements which entailed the children residing with Ms. V. He then disregarded those arrangements, and refused to return the children to Ms. V, even when she arrived at his house with the police. The agreement was made an order of this Court. Ms. V was forced to bring this application to enforce it.

20 I am not prepared to send the message that parties bound by court orders are entitled to wilfully disregard them, even when they are acting out of an understandable impulse to protect their children. But that would be the effect of directing each party to pay their own costs in this case.

21 I accept that Mr. V was worried when T came to him to say that he no longer wanted to live with Ms. V. But that did not justify unilaterally altering the court- ordered residence and contact regime then in effect.

22 Whatever the understandable emotional turmoil of the situation, in the event that he genuinely believed that the children would be better off with him, Mr. V ought to have approached a court to vary the residence and contact regime before taking any further action. He was not entitled to take the law into his own hands, however instinctively “right” that course of action must have felt at the time. Reasonable concerns can turn out to be unfounded once they are investigated with the requisite care. They do not, in themselves, justify the breach of a parenting agreement, or the wilful disregard of an order of court. The facts that the Family Advocate appears to

have found no evidence of any danger to the children, and that T later told the Family Advocate that he wants to stay with his mother after all, only emphasise how ill-advised Mr. V's conduct was.

23 Mr. V says that he was not responsible for some of the delays that led to the postponement of the matter before Meyer J. But that misses the point. These proceedings would not have been necessary at all had Mr. V not disregarded Phahlane AJ's order. He advances no acceptable reason for having done so.

24 There is a clear public interest in ensuring that court orders are obeyed, especially when they represent a considered and carefully balanced set of arrangements dealing with the best interests of two young children.

25 Accordingly, Mr. V will pay the costs of this application because, but for his misguided decision to refuse to return T and X to Ms. V, there would have been no need for it.

26 I am not, however, inclined to order costs on a punitive scale. Clause 38 of the agreement provides for the award of attorney and client costs in the event that legal proceedings become necessary to enforce it. Nonetheless, it is well established that clauses of this nature do not fetter a Judge's discretion (see *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA), paras 25 and 26). Punitive costs orders are not meant to punish human frailty. Their purpose is to discourage litigious misconduct. There is no indication that Mr. V has misconducted himself while defending this application.

27 In these circumstances, I make the following order –

27.1 Paragraphs 1.1 and 7 of the *rule nisi* issued by Wright J on 30 April 2021 are confirmed. The remainder of the *rule nisi* is discharged.

27.2 Paragraphs 13, 14 and 15 of the settlement agreement appended to the order of Phahlane AJ of 1 November 2019, under case number 2019 / 17163, are deleted. They are substituted with paragraph 8.3 of the Family Advocate's recommendation dated 20 October 2021, save for the words "on condition that the Mother will be responsible for ensuring that the children visit the Father in Gauteng during such a visit."

27.3 The respondent is directed to pay the costs of this application.

S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 4 January 2022.

HEARD ON:	28 October 2021
FURTHER AFFIDAVITS ON:	19 November and 3 December 2021
FURTHER SUBMISSIONS ON:	17 December 2021
DECIDED ON:	4 January 2022
For the Applicant:	MD Kohn Tracy Sischy Attorneys
For the Respondent:	L Pretorius Lombard and Partners Inc