Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – PORT ELIZABETH

Case No: 926/13
Date: 18 February 2014

In the matter between

N Applicant

and

N Respondent

JUDGMENT

REVELAS J

[1] In this application the applicant seeks a parenting plan to be made an order of court. The respondent no longer opposes the relief sought and the only issue for determination in this application is the question of costs.

[2] The parties hereto, both practicing attorneys of Port Elizabeth, were [….] on 10 February 2001 and were [….] on 20 October 2010 in the S [….]. Two minor children were born of [….]: C.K.N. (…..), a […..] aged [….] and a [….], K.P.N. (…….).

[3] The settlement agreement of the parties, which was incorporated in the decree of divorce, provided that both parents would act as co-guardians of the two children and be co-holders of the parental responsibilities and rights as referred to in Sections 18(2)(a) and 18(2)(b) of the Children's Act, 38 of 2005, but the respondent would be the primary caregiver and the children would reside with her.

[4] More importantly, in the context of this application, the deed of settlement provided for a range of types of decisions in respect of which the parties would make joint decisions, including *"major decisions about the children's' religious and spiritual upbringing"* Also, that in the event of them being unable to make a joint decision with regard to the children where such joint decision was required, they would enter into a process of mediation, conducted by a mediator which they both agreed upon.

[5] The parties experienced problems with regard to contact arrangements and other communication issues and they decided to submit to mediation under Dr Heather Jean Rauch, a clinical psychologist

in the hope of finalising a parenting plan. The mediation process took place for a period of over a year from April 2011 to May 2012 without final resolution.

[6] In their settlement agreement the parties agreed that the children spend Diwali (a Hindu Festival) with the applicant and Christmas with the respondent. The applicant adheres to the Hindu faith and the respondent to the Christian faith. Their different faiths became one of the subject matters of the legal spat which broke out between them in the aftermath of their divorce.

[7] Dr Rauch had been counselling C.K.N. for some time at the instance of the respondent and the parties then agreed that Dr Rauch"s mandate be amended to that of a mediator. One of the aspects regarding C.K.N. was that she did not want the applicant to take her to school in the mornings and this caused concerns but was ultimately resolved. There were also problems regarding sleepovers which were not to the applicant's satisfaction and these were also disposed of. The mediation process was ultimately unsuccessful because various draft parenting plans could not be finalized with regard to the aspect of the children's religion which remained unresolved. The applicant then applied to have the parenting plan proposed by Dr Rauch, which he wanted to adhere to, be made an order of court and the respondent opposed it.

[8] The parenting plan proposed by Dr Rauch dealt with several aspects regarding the children under the headings: Visitation, travel to and from school, telephone contract, maintenance, extramural activities, schooling, health and related matters, discipline and related matters, new relationships, change of circumstances and, most importantly for this case, the item "RELIGIOUS UPBRINGING". Under this heading Dr Rauch suggested (and the applicant endorsed this), that the parents agree that the children be raised in the Christian Faith and attend Sunday School and *"that the children will be raised to know and respect their father's Hindu faith"* On weekends, when they visit the applicant, they would still be able to attend Sunday School, but must be returned to him afterwards. If they should go away for a weekend then it would be permissible if they miss Sunday School. Christmas and Easter the children will spend with the respondent and the parties will plan visitation around these events.

[9] The respondent wanted a provision to ensure that when the children are at an age to attend classes for First Holy Communion and Confirmation and they are with their father for the weekend, these activities would not be interrupted by the *"sleepover"* arrangement. She also insisted on a clause which read as follows:

> "The parties agree that the children will not be allowed to participate or be schooled in the Hindu faith. The minor children are not to attend temple [meaning Hindu temple] while in their father's care."

[10] The applicant found this proposal unacceptable. The respondent ultimately, after the present application was ready to be heard, relented and agreed to the parenting plan proposed by Dr Rauch.

[11] The applicant contends that the respondent should pay the costs of the application in which he was successful in accordance with the usual principle that costs should follow the result. *Mr Dyke* for the respondent relied on the decision in ***McCall v McCall*** 1994(3) SA 201 (C) at 209B-C, where King J held that because the two concerned parents in that matter acted in what they perceived to be in the best interests of their son (with whom the learned judge had consulted) there was no winner or loser and accordingly declined to make any order as to costs, thereby in effect ordering that each party bear their own costs.

[12] *Mr Dyke* submitted that in the present matter there are no *"winners"* or *"losers"* cither, particularly because the question of religion was not the only issue in dispute which brought the parties to court. That is factually correct if one has regard to the papers.

[13] *Mr Rorke*, for the applicant, argued that the respondent's initial resistance to the parenting plan was sustained, obdurate, unreasonable and unnecessary. He also submitted that the approach to costs adopted in the ***McCall*** decision ought not to be elevated to a legal principle. *Mr*

Rorke strongly relied on the advice given by Dr Rauch in her letter to the parties wherein she pointed out that:

> "Your children were born into a Christian/Hindu life world, and were given Christian and Hindu names and had rituals at infancy to celebrate their lives. The children are going to be raised Christian by agreement but you will never be able to deny that the Hindu faith is part of their reality because of who their father is.
>
> For their general wellbeing I believe it is important that they are raised to respect, tolerate and be understanding of their father's faith. Accordingly, I recommend that any Hindu religious practice they are exposed to must be emphasised to be "what Dadda does", "what Dadda believes".

[14] In her answering affidavit the respondent explained that she did not understand what Dr Rauch meant by the words:

> "Should be raised to know and respect the applicant's faith" in her proposal respondent now approves of".

[15] The respondent put her view as follows:

> "I have no problem with the children being exposed to the applicant's religion to the extent that it is what he believes and what he does and that they must be taught that it is not what they believe. This is confirmed by Dr Rauch in Annexure D hereto.
>
> However, the applicant forces the children to participate in his religious ceremonies and forces them to wear "dots" on their foreheads. The applicant

teaches and schools the children in his religion which in contrary to Dr Rauch's recommendation".

[16] In my view, the respondent's initial reluctance to agree to the proposed parenting plan was not unreasonable. The differences between the two faiths, as far as religious ceremonies and rituals are concerned, are rather substantial and simultaneously schooling the children in both religions could be confusing. The respondent's wish to prevent that is understandable. The children already attend a catholic school and Sunday School. The respondent was merely acting out of a legitimate concern for her children in the wake a divorce which appears to have been traumatic. The importance of accepting their father's faith as part and parcel of what he is has now been addressed. In my view, both parents acted in the best interests of their children and therefore my approach to costs is similar to that of King J in the ***McCall*** matter.

[17] In the result the following order is made:

1. The parenting agreement attached hereto, marked "A" and endorsed is made an order of this court.
2. Each party shall pay their own costs.

E REVELAS
JUDGE OF THE HIGH COURT

Counsel for the applicant	Adv S C Rorke (SC) Port Elizabeth
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Counsel for the respondents:	Adv B C Dyke Port Elizabeth
Instructed by:	Roland Meyer & Co Attorneys Port Elizabeth
Date Heard:	13 February 2014
Date Delivered:	18 February 2014