REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 2013/24018

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

26 JULY 2013 FHD VAN OOSTEN

In the matter between

A N F APPLICANT

and

C P R RESPONDENT

Minor child - urgent application - urgency of application - primary residence of child - rights of contact by divorced parents - Children's Act 38 of 2005 - considerations arising discussed and applied

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JUDGMENT

VAN OOSTEN J:

[1] This application comes before me by way of urgency. It concerns the primary residence and rights of contact in respect of the minor child, T (4 years old), born of the marriage between the applicant and the respondent. The parties were divorced on 23

June 2010. In terms of the settlement agreement between them which was made an order of court, the parties retained joint parental responsibilities and rights in respect of T, the primary residence was to be with the respondent, the applicant afforded certain defined rights of contact and Ruth Garber appointed as the case manager.

[2] The divorce action was conducted in an extremely acrimonious manner which perpetuated in the long line of ensuing litigation, of which the present application is one. The central issue in this matter concerns allegations of sexual and physical abuse of T by the applicant and his 11 years old half-brother, who is the respondent's child born of a previous marriage, A. A lives with the respondent. His father emigrated to Australia several years ago and has had minimal contact with A. It is common cause between the parties that the respondent refused the applicant contact rights to T from 9 January 2013 until 2 May 2013. The reason for the refusal, the respondent states, is the disclosure made to her by T (he was then 3 years old) that the applicant had sexually abused him. She accordingly did what she regarded as the responsible thing to do, and reported the matter to the authorities including the South African Police and further to terminate the applicant's rights to contact with T. The director of the Teddy Bear Clinic for Abused Children, Dr Omar, subsequently assessed T and advised that the applicant's contact should be re-instated. The State declined to prosecute the applicant and a certificate of *nolli prosequi* was issued.

[3] The report of Dr Omar was forwarded by Ms Garb to Dr Duchen, a psychiatrist, for comment. In the report that followed Dr Duchen expressed the tentative view that "T will be best protected in the care of his father". This prompted the applicant to launch an urgent application to this Court on 21 May 2013 in which he sought primary residence of T alternatively that the rights of contact he had exercised prior to 9 January 2013, be restored. The matter came up for hearing before Bekker AJ who ordered, *pendent lite* (the main application), that the primary residence of T be with the respondent and that the applicant's rights to contact as at 9 January 2013 be fully restored. Shortly afterwards the main application was launched by the applicant which has progressed to the stage of the respondent having filed her answering affidavit.

[4] At the time the urgent application before Bekker AJ was heard, the respondent had already of her own accord, instructed Dr Joan Campbell, a social worker specialising in sexual offences, practicing in Cape Town, to assess the disclosures made by T to the respondent that he had been sexually abused by the applicant. The assessment was a so-called "blind assessment" *ie* without previous assessments and legal documents having been made available to Dr Campbell and furthermore without consulting the applicant. The assessment commenced on 18 April 2013 and included interviews with T, A, the respondent, the respondent's mother, Ms M and a home visit at the respondent's residence. The disclosures made by T to Dr Campbell, recorded verbatim in the report, to which I shall revert, truthfulness and reliability apart, are extremely disconcerting and are, as is common cause, indicative of at least of an abuse of T having occurred, within the meaning thereof as defined in the Children's Act 38 of 2005.

[5] Dr Campbell's report was made available to the applicant's attorneys on 21 June 2013 which prompted the launching of the present application on 5 July 2013. In this application the applicant seeks an order that primary residence be awarded to him and that the respondent be granted certain defined rights of contact. The respondent opposes the relief sought and a full set of affidavits has been filed.

[6] At the commencement of the hearing before me, the urgency of the matter was argued. The grounds in support of the respondent's opposition were glaringly vague and unpersuasive. As I understood the argument, the further investigation of the matter proposed by *inter alia* Dr Campbell was relied upon for the submission that the matter could await the outcome thereof. I am unable to agree. The interests, safety and well-being of a young child are at stake and therefore require the urgent attention of this Court as the upper guardian of all children, especially in view of the incontrovertible conclusion that something untoward must have happened to T while he resided with the respondent and A. I accordingly ruled that the application was urgent.

[7] It is necessary to state at the outset that T, in terms of a holiday arrangement between the parties, has been in the care of the applicant for the past two weeks. This application, in my view, falls to be adjudicated on the basis of an application for the amendment of the order of Bekker AJ. As much was readily conceded by counsel for

the respondent. Bekker AJ's typed judgment is before me. The learned Judge rejected as false the respondent's version, in particular the averments on the papers before him concerning the applicant molesting T. I am constrained to remark that the inherent danger of making findings of credibility on affidavits has been commented on in a number of cases. I am however mindful of the fact that I am not sitting as a court of appeal on the findings made by Bekker AJ. I have therefore decided to focus on the new evidence that has become available by way of Dr Campbell's report, which was not before Bekker AJ. Indeed had this report been before Bekker AJ I have no doubt that the following finding he has made may well have been different:

'I am further unpersuaded that A poses any physical threat to T. The objective evidence suggests that A's hurting of T consists (sic) of kicking of his leg. The allegations of a sexual nature levelled against A appear to be equally inconclusive and fictitious at this point in time.'

The disclosures made by T to Dr Campbell, merely on the face value thereof, prove exactly the opposite. I am accordingly satisfied that a proper case has been made out for the amendment of Bekker AJ's order. Finally, and for the sake of completeness, it needs to be stated that notwithstanding the credibility finding, Bekker AJ ordered primary residence to be with the respondent. In this regard the learned Judge held that there were "simply too many facts militating against upsetting T's security and comfort".

[8] This brings me to the merits of the present application. The crucial issue is whether it would be in the best interests of T to upheave him from his present environment into that of the applicant and the applicant's parents? Decisive of the issue, in my view, are the contents and nature of the disclosures T has made to Dr Campbell. Before I deal any further with those it is necessary to be alive to the inherent danger of relying on statements made by young children. The possibility of manipulation, influences, suggestions, coercion, contamination arising from untrained questioning and the like can hardly ever be ruled out. In this regard it is not surprising that Dr Campbell has suggested further investigation into the truth and veracity of the disclosures. I do not propose, for purposes of deciding this application, to enter this minefield of uncertainty and possible speculation. On the other hand, the disclosures have been made and they should be considered on the basis of facts having been put forward or perhaps more

appropriately, their face value. Adopting this approach the question arises whether anything untoward can be inferred from the mere fact that these utterances were made by a child of 4 years of age? Against this background it is necessary to briefly refer to and consider the nature and contents of the disclosures.

[9] I do not consider it necessary to refer to all disclosures made. Altogether seven sessions with T were conducted by Dr Campbell. In the first session T implicated the applicant as having sexually abused him. In this regard an excerpt of his narrative reflects the following:

'The undersigned (Dr Campbell) asked T whether someone has ever made him feel uncomfortable ("not nice feeling") or hurt him on his body. Without hesitation T answered positively, "Daddy sucks my penis…He is ugly…he sucks my penis…that is what I think".

[10] The other abuser identified by T is A. In the fourth session T's family relations were explored by using family cards and questions. The following is recorded to have occurred:

'T indicated that he doesn't want to see his father, "because M (his maternal grandmother) said "I can't see my dad" and "I can't see him because he is ugly" and "M said I am not to see him" and "Mommy said I am not to see my Daddy." The undersigned asked T why he can't see his father. T answered, "I don't know." T responded as follows to a picture of two boys sleeping in one bed, "That is A that climbs in my bed … at night … he plays with me … we have pyjamas on … he plays Humpty Dumpty game … he tickles me … I douche him and then he tickles me … here (points under belly button) … on top of my pyjamas … it is a secret game … A said it is a secret game." The undersigned asked whether T must tickle A too. He answered in the positive. The undersigned asked where he must tickle A. T answered, "I don't know." The undersigned asked T how he feels when A plays the secret game. T answered, "Cross." The undersigned explored why he feels cross about the Humpty Dumpty game and T avoided the question. The undersigned asked T who knows that A climbs in his bed to play a Humpty Dumpty game. T ignored the question. The undersigned asked, "Does mommy know A comes to play the Humpty Dumpty game in your bedroom?" Again T avoided the question. The undersigned asked whether anyone else climbs in his bed. T answered in the negative. The undersigned asked: "Who else climbs in your bed?", T answered, "Nobody." The undersigned showed many projection cards to T but no significant disclosures were made. The undersigned

continued to draw a world in which T is the king. The undersigned asked T who would live in his world and what rules he would make in his world. T enjoyed the activity and happily put in his mother and his maternal grandmother in his world. There were no friends or any other family members. The undersigned asked T why he did not put A in his world. T said, "A can be in my world if there are rules." The undersigned asked T what rules there must be before A may be in his world. Very spontaneously T answered, "A must not suck my penis when he is in my world." The undersigned explored the statement further. T made the following disclosure, "It happens in my room ... he climbs into my bed ... at my home ... wee comes out of his penis ... it becomes all melty ... then he says he needs to wee and goes to the toilet." The undersigned tried to explore further but T avoided the question and said, "I am finishing drawing now." He finished the drawing, walked to the door of the playroom and said, "I will come back in a minute ... then I will tell you." The undersigned told T that he doesn't have to talk about it if he doesn't want to and that he can continue to play with the toys without answering questions. T continued with free play until the end of the session.'

[11] It is clear from the disclosures that two perpetrators are identified: the applicant and A. Counsel for the applicant submitted that the disclosures against the applicant are less than satisfactory and in this regard relied on Dr Campbell's view that these disclosures were *inter alia* "inadequate", "unemotional and limited", "not spontaneous", "limited with no idiosyncratic detail", "included no sensory experiences" and made without any embarrassment. I have no doubt that these considerations ought to be considered once the truth and veracity of the disclosures are considered. Counsel moreover referred to the reports of other experts clearing the applicant from involvement. In my view however, the fact of these disclosures having been made is, for present purposes, sufficient. The disclosures concerning A are similarly disturbing. The respondent in an attempt to overcome this difficulty has commenced arrangements to send A to live permanently with his father in Australia. The wisdom of the rather impulsive decision aside, I am not satisfied that the proposed emigration of A can be effected within the time remaining before the hearing of the main application.

[12] I have anxiously and carefully considered all relevant circumstances. I have come to the conclusion that as a very first priority, if not necessity, T ought to be separated from A. The only manner in which this can practically, at this stage, be achieved is to award *interim* primary residence to the applicant. It is furthermore apparent from the

expert reports that the environment he has been involved in causes T unnecessary stress. I remain deeply concerned about the disclosures made by T against his father. I derive some comfort from the fact that the applicant is presently living with his parents. I unreservedly place this court's confidence and trust in the paternal grandparents, in the interests of their grandchild, not only to attempt to defuse the animosity, strife and bitterness existing between the parents of T but also to render their assistance in closely and objectively monitoring the situation from now onwards and to assist to the best of their abilities wherever they possibly can.

[13] It remains to deal with the respondent's *interim* rights to contact. Counsel for the applicant proposed 3 hours supervised contact per week. I am unable to agree as this is unreasonably restrictive. Much criticism has in argument been levelled against the respondent. She was accused of manipulating T, that she over-protected A in the face of damning allegations, that she coached T into making false allegations against the applicant and that she attempted to alienate T from the applicant. Many of these are without foundation: the respondent when the disclosures emerged took the steps that in my view any responsible and concerned parent would have taken. I do not think it is proper to scrutinise her conduct adopting an armchair approach. She undeniably relentlessly pursued the interests of her child albeit in certain respects, with hindsight, not always flawlessly. For that she cannot be blamed. I am not persuaded that her contact should be supervised: such an order would also severely prejudice T who has a healthy, close and loving relationship with his mother. In order to regularise normal contact I have decided to phase in more liberal contact in a relatively short period of time. The final order concerning primary residence of and contact with T will be made by the court hearing and deciding the main application. I consider it appropriate and necessary to expressly state that the views I have expressed in this judgment are only in regard to the present application.

[14] As to costs I consider it fair and reasonable, in particular having regard to the interests of T and the multiplicity of applications between the parties, to order that the costs of this application be costs in the cause.

[15] For these reasons I made the following order at the conclusion of the hearing of the matter:

1. The order granted by Bekker AJ, dated 21 May 2013, under case no 13916/2013, is amended by deleting the introductory sentence in paragraph 1 thereof as well as paragraphs [1.1] and [1.2] thereof, and substituting therefore the following:

'1. Pending the commencement of the hearing of the main application under case no 14878/2013:

[1.1] The minor child T, born of the marriage between the applicant and the respondent, shall primarily reside with the applicant.

[1.2] The respondent shall have unsupervised contact to T as follows:

[2.1.1] For the period from the date of this order until 25 August 2013:

[2.1.1.1] each Saturday from 09h00 until 15h00; and

[2.1.1.2] such contact to be exercised at the home of the applicant, or such other place as the parties may mutually agree upon.

[2.1.2] For the period from 26 August 2013 until 30 September 2013:

[2.1.2.1] each Saturday from 09h00 until 15h00 *and* each Sunday from 09h00 until 15h00; and

[2.1.2.2] such contact to be exercised at a place of the respondent's choice.

[2.1.3] For the period from 1 October 2013 until the commencement of the hearing of the main application:

[2.1.3.1] on each Saturday from 09h00 until 15h00, *and* on each Sunday from 09h00 until 15h00, at a place of the respondent's choice; and

[2.1.3.2] on each Wednesday evening between 18h00 and 20h00, at the applicant's home, or such other place as the parties may mutually agree upon.'

[2] Any contact between T and A, during the times referred to above, shall be exercised only under supervision of a professional expert, to be agreed upon between the parties, failing which such professional expert as may be appointed by the Family Advocate.

[3] The costs of this application shall be costs in the main application.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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DATE OF HEARING	***24 JULY 2013***
DATE OF JUDGMENT	***26 JULY 2013***