

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

16/8/16

Case no. 59992/2016

Not reportable

Not of interest to other judges

Revised.

In the matter between:

A. G

Applicant

and

D.S.G

First Respondent

**Advocate C Lindeque in her capacity as the
Legal Representative of the minor children**

Second Respondent

JUDGMENT

RABIE, J

1. The applicant approached this court on an urgent basis claiming the return to herself of the two minor children born from the marriage between her and the respondent in accordance with an order granted by the Children's Court on 22 June 2016. The children are two daughters which are 13 years of age and 8

years of age respectively.

2. The application was opposed by the respondent as well as by advocate C. Lindeque in her capacity as legal representative for the two minor children. Advocate Lindeque had been appointed as such by the Children's Court.
3. The parties are involved in an extremely acrimonious divorce. Both had obtained orders against each other in terms of the Domestic Violence Act in the Magistrate's Court. Thereafter the respondent, as applicant, initiated proceedings in the Children's Court aimed at the removal of the children from the custody of the applicant to a place of safety being with himself pending an investigation by the family advocate. The applicant filed an answering affidavit and the respondent has yet to file his replying affidavit. On 27 May 2016 the Children's Court made an interim order in terms of which the children were allowed to reside with the applicant pendente lite. The rule was extended on 22 June 2016 for hearing on 24 August 2016, which lies in the future.
4. On 21 July 2016 the parties attended a meeting at the offices of the Family Advocate. The applicant stated that she was insecure and afraid and realised on her arrival that there may be a possibility that the children might be taken out of her care and that the respondent may succeed in alienating the children from her. She consequently became extremely anxious and emotional when she realised that she would be confronted by the respondent and that they will share the same office. She stated that she is extremely afraid of the respondent who abused her during the marriage and that she suffers from depression as a result thereof. She attended the Denmar Specialist Psychiatric Hospital during January 2016 and according to her it was the result of constant abuse and humiliation that she was exposed to. The applicant stated that during the interview with the family advocate she couldn't control her emotions. She cried and became extremely anxious. She was not afforded sufficient opportunity to address the family advocate and she decided to withdraw from the interview. She said she left the offices of the family advocate in tears and sat in the passage on her heels and cried. She said that she couldn't control their emotions and that nothing was achieved during the interview with the family advocate. The applicant stated that

the family advocate immediately proceeded with the preparation of an interim report in terms of which it was recommended that the residence of the minor children be awarded to the respondent, that she would have no contact with the children and that she would have to subject herself to a full psychological evaluation which had to be submitted to the office of the family advocate after which the matter would be finalised. The children have been with the respondent ever since.

5. The applicant attached the family advocate's interim report dated 21 July 2016 and submitted that there is no justification to remove the children from her care and not to allow any contact with them whatsoever. She also stated that the order of the Children's Court is still in existence and had not been varied or discharged and consequently still applies. The applicant also submitted that the family advocate's report cannot bring about a factual change in circumstances unless and until such a report has been considered by the Court. The respondent is consequently acting unlawfully by having the children with him. Furthermore, according to the applicant, the respondent is not able to take care of the children and she is the only one that can do so.
6. Regarding the episode on 21 July 2016 at the offices of the family advocate the applicant stated that she regrets her conduct and that she unfortunately lost control of her emotions. She is functioning well as far as her psychological state is concerned. She attached a report from Me T van Huyssteen, a clinical psychologist. According to this report the applicant sees her for psychotherapy on a regular basis and currently she is working on re-establishing her life after the separation with her husband in January 2016. According to the report the applicant has insight in her responsibilities with the children as well as in handling the changes in her life circumstances. She is committed to the well-being of the children and it is reported that the children are performing well at school. It appears that after her discharge from Denmar hospital the parties agreed that the applicant would be the primary caregiver of the children. At the time her mood has stabilised and she could function normally in taking care of the children.
7. Me van Huyssteen then referred to the episode in the office of the family

advocate. She stated that the applicant suffered from severe anxiety which could be explained by all the stressors she had to cope with the same week as well as the additional stress of being present at the family advocate's offices and the normal underlying fear of losing the children. The additional stress was the hospitalisation of the daughter, K, from Sunday 17 July to 20 July 2016. She thus had to take care of the daughter in hospital and the one at home. It was stated that at the visit on 21 July 2016 at the family advocate's office the applicant was physically exhausted after the hospitalisation incident and in fear of seeing her husband. Her request not to be in the same room as her husband was denied and she was confronted with his accusations. She was consequently struck with an episode of a dysfunctional display of emotions and anxiety. Me van Huyssteen was of the opinion that this reaction was not typical of her usual functioning but was activated by her perception of constant provocation, humiliation and false accusations by her husband.

8. The applicant failed to cite the legal representative of the children as a party to the application and also failed to serve the application on her. However, upon hearing of the application the application for intervention was launched. It appears that the legal representative was appointed by the Children's Court following an altercation outside the courtroom while the parties were waiting to be called into court. The applicant approached the respondent and started verbally abusing him in the presence of the clerks of the court and the general public. During consultation with the children by the legal representative and the Magistrate the children feared that notes of the consultation would be made known to the applicant. They were assured that such would not happen. It was clear that the children were involved in this acrimonious divorce and in fact trapped in the middle. The parents were both guilty of badmouthing the other in front of the children and to involve them in their quarrels. The applicant even used one of the daughters' telephone to send messages to the respondent. This upset the daughter very much.
9. According to the legal representative it was already at that stage clear that the children were influenced against their father by the applicant. The Magistrate was extremely worried about the children's emotional well-being but they indicated

that they were happy with the applicant and did not want to be uprooted from their home. The parties were warned that the children might be children in need of care and protection should the conflict to which they were being exposed did not stop. The court ordered that an investigation be conducted to verify whether the children were in need of care.

10. The legal representative reported that during the next court appearance on 22 June 2016 the acrimony between the parties were still prevalent. Furthermore, the applicant kept interrupting the proceedings by making remarks, crying, interrupting the presiding officer and muttering to herself. This occurred to such an extent that the Magistrate requested her attorney to accompany her out of court in order to try and calm her down.
11. The one daughter, C, did not deal with the situation well at all and according to the applicant she used tranquilizers and was seen by a psychologist. She did not want to attend school any more and was sleeping in her mother's bed
12. The legal representative arranged for the children to be assessed socio-emotionally by Mrs Irma Schutte but the parties failed to finalise appointments. The applicant has also not made any psychological report regarding herself available as was ordered by the Children's Court.
13. According to the legal representative the children are both happy to stay with the respondent and both indicated that an atmosphere where nobody screams and shouts at them, is preferable. However, they wish to have contact with the applicant which would include telephonic contact. I shall revert to the issue of telephonic contact later.
14. According to the children the applicant visited them unexpectedly at school on 1 August 2016. Both were concerned that she was going to remove them without the respondent knowing of it.
15. The legal representative conducted a home visit on 2 August 2016. She found the accommodation spacious enough and also reported that the family's helper,

L, takes care of them in the afternoon. Both children were clearly happy and relaxed in her company.

16. According to the legal representative the circumstances at home with the applicant were not satisfactory. Apparently the applicant was "too sad to cook for them" and all they got to eat was "junk food". This caused the child, C, to eventually stop eating and she landed up in hospital. According to the children the applicant became upset most of the time and screamed a lot at them. This even happened over the telephone since they have been with the respondent.
17. The applicant visited the school of the children on the 1st and the 2nd of August 2016 making a scene and insisting that she was entitled to see the children. She told the children that she was carrying pepper spray with her and that she was going to use it on the respondent should she come across him.
18. According to reports the children get very nervous and anxious when the applicant screams at them on the telephone and they are in fear that she would cause trouble at school and embarrass them by screaming when she gets to the school. They also carry the burden of making plans in an attempt to keep the parents apart to avoid conflict.
19. The children clearly struggle with the uncertainty regarding the living circumstances and contact with their parents. Both expressed the wish to stay with the respondent and to have contact with the applicant. This should at least be the position while the applicant is receiving treatment.
20. According to the legal representative both children are in desperate need of stability and predictability in their lives. Their lives had been disrupted and they wish for things to settle down. Both children expressed the wish for telephonic contact with the applicant but on the condition that she does not scream and yell at them. According to the legal representative the family advocate recommended no contact between the applicant and the children pending psychological evaluation of the applicant. It was also advised that both children should start therapy as soon as possible, especially C. She was also of the view that the

children should not be moved from their environment for at least the next six months.

21. In the answering affidavit filed by the respondent he extensively detailed incidents in order to show that the applicant is emotionally unstable and that it is not in the interest of the children to be in her primary care.

22. I do not intend to refer to all the incidents, many of which the applicant denies and many which she endeavours to put in perspective but it is necessary to refer to some thereof in order to understand how it came about that the respondent initiated the process in the Children's Court.

23. At the outset it is necessary to remark that there exists a long history of serious allegations and counter allegations between the parties which have been referred to in the documents presented to the Children's Court but which the applicant selectively failed to place before this court. She clearly did not take this court into her confidence. She also failed to cite and notify the legal representative of the children of her application.

24. However that may be, some of the more serious allegations by the respondents were the following. On more than one occasion the applicant threatened to take her own life as well as those of the children. She did so in quite graphical manner. She also threatened, on more than one occasion, to remove herself and the children to outside the borders of the country. She assaulted the respondent on numerous occasions and once chased after him wielding a knife. He fled the scene in his motor vehicle. It was also alleged that she once threatened one of the children with a knife.

25. The applicant had many and frequent emotional outbursts. She would scream, rant and rave in front of family, the domestic worker, neighbours, teachers and other strangers. The most disturbing aspect is that these episodes of emotional outburst seem to have become more frequent and more intense. There was an incident at a birthday party when she lost control and a series of incidents relating to the manager and security where she resides which resulted, inter alia,

in a request by the home owners Association that she refrains from harassing and abusing the security personnel and other members.

26. According to the respondent she continuously screams and shouts at the children and at the domestic worker, L, when she was still working for the applicant. She eventually assaulted L with a cellular phone which caused L to leave her employ. The incident was apparently prompted by L suggesting that the respondent be called because of the illness of one of the children. There are also allegations that the applicant, who has met a new friend, stays away late at night from home and uses a controlled substance.

27. On more than one occasion the applicant went to the respondent's place of work, despite the family violence interdict forbidding her to do so, and made a huge scene. She shouted and screamed at the respondent, choked him and also kicked a glass door breaking the glass. She also screamed and swore at his business colleague. According to the respondent the applicant is totally uncontrollable when she goes into this type of fit and that she does so without provocation. According to the respondent this lately happens on almost a daily basis. The respondent then related incidents where he would speak to the children on the telephone when he could hear the applicant screaming and swearing in the background. This has been confirmed by notes from the children to him.

28. I have already referred to the emotional outbursts in the Children's Court and at the office of the Family Advocate. During the one in the office of the Family Advocate the applicant mumbled to herself and disrupted the consultation and when she was reprimanded the applicant swore and shouted at the respondent, ran down the passage screaming and threw herself on the floor crying hysterically. She clearly underplayed her actions in her founding affidavit. The children, who were in an office close by, could hear her ravings and they were extremely upset. The applicant had lost total control of herself and acted in such a manner that the family advocate decided there and then that the children should be with the respondent and that they should have no contact with the applicant. It is also not insignificant that for quite some time after the event, the

applicant's lawyers were unable to obtain instructions from her.

29. I have mentioned before that the applicant denied or qualified most of the allegations and had made allegations of improper conduct against the respondent. However, having regard to all the facts before this court I agree with the submission on behalf of the legal representative on behalf of the children that I cannot come to the conclusion that the children are not in danger should they be in the care of the applicant. I am not impressed by the report of the applicant's psychologist. It is not known exactly why the applicant found herself in Denmark and no evaluation of her psychological state had been presented. It is also unknown what medication had been prescribed and what the prognosis is.

30. For a single parent to take care of children requires emotional stability and the ability to deal with all situations in a rational manner, even in the face of adversity. Despite her denials and explanations I am of the view that the applicant presently does not possess these qualities.

31. In my view it is not in the interests of the children to be in the primary care of the applicant. It is clearly in the best interest to be in the primary care of the respondent. I accept without reservation that the applicant loves both children very much but enough has been placed before me to conclude that they would probably not be safe in her primary care.

32. Despite the ruling by the Family Advocate that there be no contact between the children and the applicant, the respondent has indicated that the court should consider awarding some form of restricted contact under the supervision of a properly qualified person. I agree with this submission. I also agree that the parties should endeavour to agree on the appointment of such a qualified person but should they not be able to do so, the office of the family advocate should nominate such a person for appointment by the parties. I also agree with the agreement which was apparently reached between the legal representatives of the parties in the office of the Family Advocate namely that the proceedings in the children's court had been overtaken and should proceed in this court. I also agree with the proposal by the Family Advocate that the applicant submits herself

to a comprehensive psychological evaluation and that such a report should be submitted to the office of the Family Advocate.

33. Due to the fact that the telephone contact between the applicant and the children, which cannot be controlled, had been abused and had been most upsetting to the children, I am of the view that there should presently not be any telephonic contact between them.

34. Lastly the issue of costs. It was submitted on behalf of the respondent that the two attorneys of the applicant should jointly and severally with the applicant be ordered to pay the costs of this application *de bonis propriis*. The reasons being, inter alia, that they were fully apprised of the applicant's emotional outbursts and other worrisome facts but failed to make a full and proper disclosure thereof to this court. They also failed to make a full disclosure of what occurred at the office of the Family Advocate and the fact that they were unable to obtain instructions from the applicant due to her emotional state.

35. Advocate van Vuuren appeared on behalf of the two attorneys and submitted that the issue of paying costs *de bonis propriis* is an extremely serious matter and that the attorneys simply did not have sufficient time to present their case before this court. Consequently he moved for a postponement to allow the attorneys to fully and properly present their case to this court. This request was opposed on behalf of the respondent.

36. The issue of costs is not urgent and with reference to all the circumstances I am of the view that the issue of costs relating to the two attorneys should be postponed sine die to allow for the attorneys to present their case. I have considered making a cost order against the applicant at this point but have decided that the matter should rather be postponed sine die so as not to curtail the discretion of the court deciding the claim for costs against the aforesaid attorneys.

37. Lastly, the parties applied for the limitations of Rule 43 (7) and (8) to be uplifted. In view of the peculiar circumstances of this case and the issues involved therein

I would have been inclined to uplift such limitations. However, since the issue of costs shall be decided by another court, the issue of the upliftment of the limitations should also be postponed sine die.

38. In the result the following order is made:

1. The applicant's application is dismissed.
2. The applicant is hereby ordered to adhere to the Family Advocate's directive in its interim report and to submit herself to a full forensic psychological evaluation to determine her emotional state.
3. The report of the aforesaid forensic psychological evaluation shall be made available to the Family Advocate, the respondent and the legal representative of the children.
4. Pendente lite, and until the Court varies this order:
 - 4.1. The minor children of the applicant and the first respondent will be in the primary care of the respondent.
 - 4.2. The applicant is entitled to have contact with the minor children only under the supervision of a social worker once a week for two hours, until the rights of contact are extended by the Family Advocate.
 - 4.3. The social worker mentioned in the previous paragraph shall be appointed by the applicant and the respondent jointly and should they failed to agree, a social worker nominated by the Family Advocate's office shall be so appointed.
5. The cost of this application including the issue as to whether the limitations of Rule 43 (7) and (8) should be uplifted are postponed sine die.

C.P. RABIE

JUDGE OF THE HIGH COURT