

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

31/8/2021

CASE NO: 81907/16

In the matter between:

A[....] J[....] C[....] V[....] Applicant

AND

C[....] V[....] Respondent

JUDGMENT

Mthimunya AJ

Introduction

- [1] This is a Rule 43 application in terms of which the applicant (the father) seeks to be awarded parental rights in respect of the three minor children born of the marriage. Specifically, he wants the primary residence of all three minor children to vest with him and the respondent (the mother) to be given limited contact rights with no sleepovers. The basis of this application is the report of the Family Advocate dated 17 December 2020, which he seeks to be made an order of court pending the finalisation of the divorce proceedings. Further,

he wants the respondent to contribute financially towards the maintenance of the minor children.

- [2] The respondent is opposing this application *in toto* and has launched a counter-claim seeking equal parental responsibilities for both parties, the primary residence and care of the two minor children (the girls) to vest with her, and for the applicant to contribute to her legal costs in the amount of R35 000.00 (Thirty-Five Thousand Rand).

Factual Background

- [3] The parties were married to each other out of community of property with the inclusion of the accrual system, which marriage was entered into on 4 May 2002. Three minor children were born from the marriage namely, B[....] C[....] v[....] (a boy currently 15 years of age), H[....] E[....] v[....] (a girl currently 12 years of age) and L[....] J[....] v[....] (a girl currently 10 years of age). Henceforth I will refer to the children by their first names.
- [4] In 2016, the marriage relationship deteriorated resulting in the applicant instituting divorce proceedings against the respondent on 19th October 2016. Seven months later (around May 2017) the parties reconciled, which reconciliation led to the abandonment of the divorce proceedings. Towards the end of 2019 it became clear that their marriage had irretrievably broken down and the applicant decided to resuscitate the divorce proceedings, which proceedings are still pending. The applicant has now brought this application *pendente lite*.

The Applicant's case

- [5] The applicant avers that the respondent abuses alcohol and this leads to her having extreme erratic behaviour and mood swings, to which the children are exposed. She also suffers from depression, he says, and as result is on a drug called Nuzak. Although this drug should not be taken with alcohol, the respondent does so. He further alleges that on numerous occasions, the respondent put the children's lives in danger by driving with them whilst under

the influence of alcohol.

- [6] The applicant has been staying with B[....] since December 2019. H[....] also moved in with the applicant in March 2020, leaving the respondent only with L[....]. Although L[....] sleeps over at the applicant's place on Fridays, the applicant takes care of her during the week after school as the respondent works until 16:00 and attends fitness classes on certain days in the week. He contends it is not in the best interest of the children to be separated. He is able to provide them with a safe, stable and loving environment conducive for their mental and emotional wellness, as well as their development. As such he wants primary residence of all three minor children to vest with him.
- [7] In respect of maintenance, the applicant submits that his expenses in respect of the two children amounts to R25 638.00 and this will increase if this application is successful. Consequently, he requests a financial contribution by the respondent amounting to R16 836.00 and for the respondent to maintain the children on her medical aid. The proposed maintenance amount was abandoned during the submissions and replaced with 'R5 000.00. The reason for this was that at the time of bringing this application, the applicant did not know what the income of the respondent was. Only on receipt of her opposing papers did he become aware and decided to reduce the amount.

The Respondent's Case

- [8] The respondent opposes this application *in toto* and wants residency and primary care rights in respect of the girl children viz. H[....] and L[....]. She contends that H[....] had no intentions of permanently residing with the applicant but was visiting when the first lockdown happened in March 2020 and that resulted in her extended stay. She says the only reason H[....] wanted to be with the applicant during that time was because she would have her own bedroom, computer, access to Wi-Fi and Netflix. She claims the applicant manipulated H[....] as she could hear him whispering..]g things to H[....] on the video she had made to communicate her choice to stay with the applicant. She concedes that her relationship with B[....] is not good and she holds a view that this is caused by the applicant manipulating B[....] against

her. She respects B[...]'s choice to reside with the applicant and therefore B[...]'s residency is not in dispute.

- [9] She admits that she does enjoy a glass of wine from time to time but she knows when to stop and denies that she abuses alcohol. She contends that she did not submit to the second test because firstly she was paying for the tests herself and these were expensive and secondly that the first results had been normal and did not implicate any alcohol abuse. This was communicated by her doctor Dr L Maree of Southlake Medical Centre in an email dated 29 September 2020, which email was forwarded to the Family Advocate. She posits that the second results would have been no different.
- [10] She records that through her attorneys of record, she has requested the applicant to enter into settlement negotiations to finalise divorce proceedings and the applicant refuses to negotiate regarding the care and contact of the minor children and insist on implementing the recommendations of the Family Advocate, certain parts of which he has on his own implemented. She submits that the applicant has brought this application to manipulate processes in his favour and having to defend it has put her in incomprehensible financial difficulty.
- [11] She also avers that the applicant is very controlling, lacks empathy and is ill tempered and violent. As a result, the children are afraid of the applicant and would plead for him not to know if they misbehaved because of fear of his temper-driven consequences. She alleges that there was an incident involving a gun and at some point the residents ended up beating the applicant. I must state herein that this court was not furnished with any proof of charges having been laid against the applicant. As well, no reference is made thereto in both reports of the Family Advocate.
- [12] She confirms that she is on Nuzak but denies that she suffers from depression. She explains that she suffers from Post-Traumatic Stress Disorder (PTSD). Dr Lene Maree, in a letter dated 14 October 2020 confirms that Nuzak is used to treat Post-Traumatic Stress Disorder (PTSD). The respondent avers that her PTSD was as a result of years of trauma she suffered in the hands of the applicant.

The report of the Family Advocate

- [13] The purpose of the office of the Family Advocate is, *inter alia*, to promote and protect the best interests of the minor or dependent children in disputes pertaining the parental rights and responsibilities. It achieves this by investigating any matter and circumstances pertaining the minor children and providing a report with recommendations in respect of the interests of such children. This report then assists the courts in the determination of the best interests of minor and dependent children in divorce proceedings.
- [14] The applicant, through his attorneys or record approached the Family Advocate to investigate what would be in the best interests of the minor children in terms of Section 1 of the Children's Act 38 of 2005, specifically as regards to primary care and contact. To investigate the allegation of alcohol abuse, the Family Advocate required the respondent to submit to two separate 'without prior notice' alcohol tests. The respondent only attended one and failed to attend the last test. The results of the first tests were normal i.e. showed no alcohol abuse as explained by Dr Maree.
- [15] The Family advocate issued an interim report on 7 September 2020 to the effect that further investigations need to be conducted and more information obtained before the report could be finalised. The final report was issued on 17 December 2020 in terms of which, despite the results of the first test, the Family Advocate opines that it cannot rule out alcoholism on the part of the respondent.
- [16] In terms of the report, Ms MS Maluleka, a registered social worker and a Family Counsellor, interviewed all three minor children. During the said interviews, B[...] chose to stay with the applicant because his mother (the respondent) abuses alcohol and he does not have a good relationship with her. H[...] strongly voiced her desire to remain in the applicant's primary care and residency. Her reasons are also that the respondent abuses alcohol, chooses her social life over them and always takes L[...]s' side when the siblings quarrel. L[...] made excuses for her mother's alcohol abuse and expressed her wish to stay with her. The Family advocate's view is that L[...]s' choice is that of a young, emotionally immature child who is not in a

position to make a decision which is in her best interest. The Family Advocate further reports that L[...] looked untidy and unkept compared to her other two siblings. All three minors are reported to be progressing well academically.

[17] The Family Advocate's conclusion is that on the basis of the fact that alcoholism could not be excluded, L[...]’s neglect based on how she looked at the interviews, and the choices made by B[...] and H[...], it would be in the best interest of all three minor children for their primary residence to vest with the applicant. The respondent to exercise very limited contact rights with no sleepovers.

[18] The original reports of the Family Advocate, both interim and final, were written in Afrikaans. This court requested that the said reports be translated to English for ease of reference. I herein quote the relevant sections of the translated version of the final report:

"The placement of all children in the care of the Plaintiff is deemed to be in their best interests after a discussion with the Family Counsellor Ms Maluleka. The alleged abuse of alcohol by the Defendant could not be comprehensively followed up as a result of her lack of co-operation. If the care of the various children is compared, then L[...]’s physical neglect is in contrast to the care of B[...] and H[...], who live with their father. The risk of alcohol abuse by the Defendant places L[...] in a care situation which is risky for her. The Plaintiff is considered to be the parent who can offer the maximum security to the children and is already successfully functioning as a single parent for the two oldest children"

[19] It appears that the recommendation of the Family Advocate is based on two findings. The first is the allegation of alcohol abuse by the respondent and the second being the choices of the children allegedly articulated during interviews with Ms Maluleka. It has been articulated that the Family Advocate requested the respondent to subject herself to two without-notice alcohol tests. The results of the first test were normal and did not implicate any abuse of alcohol. The Family Advocate asserts that notwithstanding these results, alcoholism cannot be excluded. It suggests that only if both results were normal would alcohol abuse be excluded. This court has some difficulty with

this reasoning. The respondent, in her papers served to the applicant on 20 April 2021, articulated her reasons for failing to attend the second test, mainly being lack of funds as she had to pay for the test herself. Knowing the critical implications of these results and what was at stake, I would assume that the applicant would have gone to lengths to ensure that the respondent subjects herself to the second test, at least by offering to pay for the second test. The respondent was not unwilling to subject herself to the second test, she simply could not afford it. There was ample time between the date on which the respondent's papers were served on the applicant and the date on which this matter was heard for the Family Advocate to reopen the investigation to allow for the second test. There is no indication that such offer was made to the respondent.

[20] The argument that the respondent refused to undergo the second test because she feared that the test would be positive is rejected. The respondent had no knowledge of when she would be required to subject herself to the first test, yet she complied within the 24-hour notice. That is the test that could have taken the respondent by surprise and had the results thereof been indicative of alcohol abuse, and the respondent refuses a subsequent test, the argument of the applicant would be plausible. The respondent was given a third and fourth opportunity to subject herself to the test but no financial assistance was offered in this regard. That is her defence and this court accepts it, having taken into consideration her financial position as disclosed to this court.

[21] The applicant further argues that the fact that the respondent, on receiving the results, first sent them to her physician for interpretation should raise eyebrows. The same copy that was sent to the physician was later forwarded to the Family Advocate, there was no dispute in this regard. I do not see anything wrong with the respondent seeking to understand her results independently whether prior of after the results were forwarded to the Family Advocate. The point of the matter is that the results did not indicate any alcohol abuse on the part of the respondent.

[22] It is clear that the Family Advocate drew a negative inference from the failure

of the respondent to submit to a second test, and concluded that the allegation of alcohol abuse is proven despite the results being normal. This court is asked to follow suit and draw this inference, and from that inference make a determination on the best interest of minor children. This court can only work with substantiated evidence. Otherwise the court runs a risk of issuing a sanction at the behest of any party with serious but unsubstantiated allegations. What is before this court, is an allegation and undisputed test results that negates the allegation. It follows therefore that the conclusion of the Family Advocate on that aspect must be rejected.

- [23] The second basis of the Family Advocate's recommendation is that the older children, are said to have both chosen to live with the applicant citing the abuse of alcohol by the respondent. The same reason i.e. alcohol abuse is cited to justify the limited contact rights proposed by the applicant to be granted to the respondent.

"contact with the Defendant is considered to be in the interests of the children, but the risk of alcohol abuse by the Defendant remains. Thus contact with the Defendant is limited to day visits, without sleepovers, which will ensure the safety of the children"

On the basis hereof, the Family Advocate recommends that:

1. *Full parental rights and responsibilities in respect of care be awarded to both parties.*
2. *Primary residency of the three minor children be awarded to the Plaintiff.*
3. *Specific parental rights and responsibilities in respect of contact be awarded to the Defendant for day visits every second weekend on Saturday and Sunday from 09:00 to 17:00.*

- [24] From the reading of clause 7 of the preliminary report, it is clear that when the preliminary report was issued, interviews had already been conducted with the minor children. It reads *"Individual discussions were held with each child and the information obtained will be made available at a later opportunity."*

Clause 8 then lists the information that the Family Advocate had to obtain before the investigation could be completed. This information related to:

- (i) *Alleged alcohol misuse by the Defendant.*
- (ii) *Depression of the Defendant.*
- (iii) *Monitoring of the contact.*
- (iv) *School reports for each child*
- (v) *A discussion with Ms Uys, a social worker, in respect of the two daughters."*

In terms of Clause 9, a final recommendation could not be made until the outstanding information was obtained.

[25] From the final report, and the papers before this court, information in respect of the misuse of alcohol was addressed by the alcohol results. This court has discussed its finding thereon at length. The allegation that the respondent suffers from depression has also been dealt with. The contact monitoring spreadsheet was submitted to the Family Advocates as well as the school reports. The final step in terms of the list was a discussion with a certain Ms Uys in respect of the two daughters. It is not clear from the translated version if the discussion was to be between Ms Uys and the H[....] and L[....], or it was to be with someone else about H[....] and L[....]. What is notable though is that there is no mention of this in the final report and therefore this court assumes that the discussion between the Social Worker and the two daughters or with the Social Worker in respect of the two daughters, whatever the case may be, never happened. This is important when one has cognisance of the fact that the two daughters' primary care and residence is what is before this court to determine. It appears that the Family Advocate finalised the report without this having been done despite the provisions of clause 9 of the preliminary report.

[26] The recommendations of the Family Advocate are based on the interview by Ms Maluleke only, who although she has 24 years' experience, is not a child psychologist. The respondent avers that a request to have the children assessed by an independent child specialist was made and rejected by the applicant. This court fails to understand how such an intervention could be ignored in light of allegations of violence, abuse and manipulation of minor children. In my view, an independent assessment by a child expert would either prove or disprove these allegations and form a justifiable basis of a

recommendation in respect of the best interests of the minor children.

- [27] The respondent contends that there are material facts that were brought to the Family Advocate's attention but the Family Advocate totally disregarded those facts without any justifiable reason. As a result, thereof, she contends, the Family Advocate's report does not reflect the true state of affairs and as such fails to paint a clear picture of 'the best interests of the minor children'. This allegation against the office of the Family Advocate is viewed in a serious light by this court and as such cannot be ignored.

Section 9 of the Children's Act 38 of 2005 ("the Children's Act") provides that "*In all matters concerning the care, protection and wellbeing of a child, the standard that the child's best interests is of paramount importance, must be applied*"

This is in accord with section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996, which provides that "*a child's best interests are of paramount importance in every matter concerning a child.*"

- [28] Section 7 of the Children's Act sets out facts which **must** be considered when the best interests of a child standard is applied. These are:

"(a) *the nature of the personal relationship between -*

- (i) *the child and the parents, or any specific parent; and*
- (ii) *the child and any other care-giver or person relevant in those circumstances;*

(b) *the attitude of the parents, or any specific parent, towards-*

- (i) *the child; and*
- (ii) *the exercise of parental responsibilities and rights in respect of the child;*

(c) *the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;*

- (d) *the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-*
 - (i) *both or either of the parents; or*
 - (ii) *any brother or sister or other child, or any other care-giver or person, with whom the child has been living;*
- (e) *the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;*
- (f) *the need for the child-*
 - (i) *to remain in the care of his or her parent, family and extended family; and*
 - (ii) *to maintain a connection with his or her family, extended family, culture or tradition;*
- (g) *the child's-*
 - (i) *age, maturity and stage of development;*
 - (ii) *gender;*
 - (iii) *background; and*
 - (iv) *any other relevant characteristics of the child;*
- (h) *the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;*
- (i) *any disability that a child may have*
- (j) *any chronic illness from which a child may suffer;*
- (k) *the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;*
- (l) *the need to protect the child from any physical or psychological harm that may be caused by-*

- (iii) *subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or*
- (ii) *exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;*
- (m) *any family violence involving the child or a family member of the child; and*
- (n) *which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child"*

[29] The applicant's Counsel argued that all the issues raised by the respondent were taken into consideration by the Family Advocate yet there is no reference thereto in the Family Advocate's report. Neither is there any explanation why these allegations were rejected at the least. This court is cognisant of the fact that, more often than not, the party against whom the recommendation goes will be disgruntled and will criticise the report. The Court however has a duty to consider the report holistically and satisfy itself that the investigation was thorough to ensure the safeguarding of the interest of the minor and dependent children, as well as satisfy itself as to the Family Advocate's reasoning in arriving at the recommendations.

In **S v G [2018] ZAGPPHC 614**, which the applicant has also relied on, Mabuse J at para 32 states:

"The Family Advocate's report will always be a debatable issue from the perspective of a disgruntled party, especially where its recommendations do not satisfy such a party. The one party who is not favoured by such a report, especially its recommendations, will always look at such report with an askance eye in order to find faults in it. The purpose of the Family Advocate's report is not so much to please the parties as it is to place information before the Court in order to guide it to make a finding on the best interests of the minor or dependent child. It is accordingly the court itself that must complain about the deficiency in the report. This is so because no party will be satisfied with the report that does not favour him or her. If the court were to allow the parties' unrestricted criticism of the report to supercede its discretion, such

criticism of the Family Advocate's report by the parties will never cease. The question therefore is not whether, in the eyes of the parties, the Family Advocate's report is defective or not, but whether or not, for the purposes of establishing the best interests of the minor or dependent child, such a report serves its purpose and whether the Court is satisfied with it, despite the perceived shortcomings"

- [30] It is a trite that the Family Advocate cannot be subpoenaed to come to court and give evidence or clarify certain issues in its report. In **S v G [2018] ZAGPPHC 614**, Mabuse J, at Para 23 articulates: *"It is of paramount importance to point out that the Family Advocate cannot be subpoenaed to Court as a witness to testify on behalf of any party even if his or her recommendation favours either of the parties to a dispute"*
- [31] The court must rely only on the contents of the said report and the recommendations therein in making a determination on the best interests of the children. For this reason, it is critical that all material information be included in the report to assist the court. That L[...] is said to have attended the interview looking untidy and unkept is indeed worrisome. On the basis thereof the recommendation is that she be removed from her mother yet this is the only child said to have chosen her mother, despite the alleged alcohol abuse, which she is said to have defended. This court does not have the luxury to question the Family Advocate on this report to clarify what it means by untidy and unkept. Whether L[...] had come from the respondent's house to attend an interview or had been from the applicant's house after school, such detail is not contained in the report. At the least, a corroborative statement from an independent expert would have been helpful.
- [32] It is further argued on behalf of the applicant that the respondent's allegations about the applicant being violent, abusive and manipulative are far-fetched based on the breakdown of the relationship between the respondent and her children. Other than the concession on both sides that the relationship between the respondent and B[...] is not good, there is no evidence before me that the relationship between the respondent and the other two minor children, has broken down. H[...]s articulation of her choice is disputed by the respondent as having been influenced and manipulated by the respondent.

This is one of the allegations that this court views in a serious light to have merited the reopening of the investigations by the Family Advocate. Counsel for the applicant argued that the respondent should have taken steps 'a *long time ago*' if she was not satisfied with the final report of the Family Advocate. The respondent raised these issues in her letter dated 29 January 2021. She further alluded to the same issues in her opposing papers served on 20 April 2021. Had these allegations been given the attention they deserve, in light of the best interest of minor children, specifically **Section 7 (b), (h), (/) and (m) of the Children's Act** cited above, there would have been ample time for the Family Advocate to reopen its investigation and consider these allegations, prior to the hearing of this application.

[33] It is also notable that although both parties have made serious allegations against each other, what is reflected in both reports is the investigation of alcohol abuse by the respondent, the concerns of the children about the respondent and their choice in terms of residence. There is no indication of whether the allegations of ill-temper, manipulation, violence and abuse by the applicant, which the respondent says she raised during the visit to the office of the Family Advocate, was investigated and explored with the children. An omission like this is worrying to the court that must rely on the Family Advocate's report to make a determination. The report of the Family Advocate therefore, was not helpful to this court. For the reasons articulated throughout this judgment, this court must then reject the recommendations of the Family Advocate.

[34] I now turn to deal with the issue of contribution to legal costs. The respondent has requested this court to order a contribution towards her legal costs by the applicant to the amount of R35 000.00. I have considered the respondent's financial position as disclosed. Similarly, I considered the financial disclosures of the applicant, noting the objections to the disclosure raised by Counsel for the respondent and the explanation thereof in the applicant's supplementary heads of argument. Other than her financial declaration and proof of income, the respondent did not deem it necessary to favour this court with vouchers or any document to justify this request. Consequently, this court has no basis upon which it can order the contribution as requested by the respondent and

as such, that prayer is denied.

- [35] Similarly, the applicant has requested a contribution towards maintenance by the respondent in the revised amount of R5 000.00. The basis thereof is that his expenses will increase if this application to have primary residence and care of all three minor children succeeds. For reasons explained throughout this judgment, I am not persuaded that the applicant has made a case for the said order to be granted, neither that it will be in the best interest of the three minor children to do so. It follows therefore, that the applicant is not entitled to any maintenance contribution from the respondent.

In the result, I make the following order *pendente lite*:

1. The applicant and the respondent shall have equal parental responsibilities and rights with regard to the three minor children as contemplated in section 18(2) of the children's Act 38 of 2005.
2. The primary residence and care of H[....] E[....] V[....] and L[....] J[....] V[....] is awarded to the respondent.
3. The primary residence and care of B[....] C[....] V[....] is awarded to the applicant.
4. The applicant is granted contact rights in respect of H[....] and L[....] every alternate weekend from Friday 16H00 to Sunday at 17H00.
5. The three minor children must be interviewed and assessed by a Child Psychologist and an Educational Psychologist ("children experts") to conduct an independent assessment to determine what would be in their best interests in terms of care and residency. The cost of the assessments is to be borne by the applicant.
6. The Family Advocate is directed to continue with the inquiry, issue a new report incorporating all issues raised herein and the findings of the children's experts cited above, which report shall assist the court hearing the divorce action in due course.

7. The applicant to pay the costs of this application on a party and party scale.

Mthimunye DP

Acting Judge of the High Court

Gauteng Division

Date of Hearing : 02 August 2021

Date of Judgment : 31 August 2021

Appearances:

For the Applicant : Ms J De Swardt

Instructed by: Jansen Van Rensburg Attorneys

For the Respondents: Mr HW Watson

Watson Law Inc.