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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 3098/2020

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

R[....] F[....] K[....]

PLAINTIFF

And

M[....] D[....] K[....]

DEFENDANT

JUDGEMENT

KGANYAGO J

[1] The plaintiff and defendant were married to each other in community of property. The plaintiff has instituted a divorce action against the defendant seeking orders that a decree of divorce be granted; equal division of the joint estate; 50% of each party's pension interest; that parental responsibilities and rights with regard to the minor children be awarded to the plaintiff; both parties retain full parental rights and responsibilities with regard to the guardianship of the minor children; the parental rights and responsibilities with regard to reasonable contact with the minor children be awarded to the plaintiff, with the parties alternating equally during public holidays and school holidays, and the defendant having reasonable telephonic and physical contact at all reasonable times.

[2] The defendant is defending the plaintiff's action and has filed a counterclaim. In his counterclaim the defendant is seeking orders that a decree of divorce be granted; equal division of the joint estate; that both parties retain full parental responsibilities and rights in respect of the minor children born of the marriage between the parties; that primary residence of the minor children be awarded to the defendant; that specific parental responsibilities and rights with regard to the contact of the minor children be awarded to the plaintiff; that both parties retain full parental responsibilities and rights with regard to the guardianship of the minor children; that the plaintiff be ordered to pay an amount of R1000.00 per month per child as maintenance of the minor children; that the plaintiff retain the minor children on her medical aid scheme; and that the Government Employee Pension Fund be ordered to pay the defendant 50% of the plaintiff's pension interest in the said pension fund.

- [3] The plaintiff and the defendant were able to settle all other aspects of the patrimonial consequences of their marriage, including obtaining decree of divorce, except as to who must retain the primary residence and care of the minor children. The parties' settlement agreement was reduced to writing and signed by both parties. By consent between the parties the settlement agreement was handed in as an exhibit. The only issue which this court is required to determine is the primary residence and care of the minor children. The parties have agreed that the plaintiff bore the duty to begin. The parties also agreed that the reports of MJ Mahlo (family advocate) and SF Nquadi (family counsellor) be handed in by consent as evidence without the authors of the two reports giving oral evidence in court.
- [4] The plaintiff testified under oath. She testified that she and the defendant were married to each other in community of property on 24th February 2007. From the said marriage four minor children were born, a girl who is currently twelve years of age; a boy currently seven years of age; and a boy currently five years of age. All the minor children are currently residing with the defendant through an interim order granted in the children's court.
- [5] The plaintiff is requesting that she be awarded the primary residence and care of the three minor children, with the defendant being awarded specific visiting rights. The plaintiff stated that she and the defendant have already agreed on the parental responsibilities of a party who does not succeed in obtaining primary residence and care of the minor children. The plaintiff agrees with the findings and recommendations of the family advocate and family counsellor.
- [6] The plaintiff testified that she is employed as a police officer, stationed in Polokwane SAPS, and is working from 7h00 to 16h00 Mondays to Fridays.

She was employed by the SAPS during 2005 wherein she was stationed in Lebowakgomo police station. During 2008 she was transferred to Polokwane station, and in 2015 she was transferred to Musina station. During February 2020, the defendant assaulted her, and when she explained her situation to her employer, she was transferred back to Polokwane station with effect from March 2020.

- [7] The plaintiff further testified that she is having a good relationship with their children, and that whilst working in Musina she was seeing them every weekend, and will also phone them during the week. Currently the children are in temporary care and residence of the defendant, and she is experiencing communication breakdown with the children as defendant does not allow them to talk with her on the phone that he had bought. She had to buy another phone for the minor children so that she can be able to communicate with them.
- [8] According to the plaintiff, when their first born child was born during 2008, she was stationed in Polokwane working from 7h00 to 16h00, Mondays to Fridays whilst the defendant was working in Lephalale coming home during month end. From Lephalale, the defendant went to work in Mpumalanga and Cape Town until 2011, and coming home during month end. During this period wherein the defendant was working far away from home, she was the one who was taking care of their first born child with the assistance of their domestic servant. That the defendant only came back to work in Polokwane either during 2011 or 2012. The second child was born on 16th June 2014.
- [9] During 2018 she joined a leisure company as a member. Her membership with that company was allowing her to travel and also do business with that

company. She was using her membership to travel with her children. However, due to covid 19, that company stopped operating and she had terminated her membership. At the time of termination of her membership, she was a senior representative of that company. With the income she was generating from that company, she was using it to supplement in the running of the household needs.

[10] The plaintiff further testified that she does not have a problem with her children, and that her children are still young. The first born is a girl and is at puberty stage where she is experiencing changes in her life, and that she needs her (plaintiff) for advice. That the first and second born have told her that they wish to stay with her and that they will visit the defendant. The last born had told the plaintiff that he misses her. The family counsellor had visited the place where she is currently staying. The plaintiff alleges that she is temporarily staying at that place until the finalisation of the divorce, and that she had moved into that place after she was assaulted by the defendant.

[11] According to the plaintiff if she gets primary residence and care of the minor children, when she is at work the children will be at school. She does not intends relocating out of Polokwane, or changing the children's current schools. She is working in Polokwane and her sister will also be assisting to take care of the children if they are at home and she is at work. The plaintiff alleges that the defendant is short tempered, and that whilst they were still staying together, the defendant was telling her that the second and third born children were not his, and he even wrote her a note asking her as to who was their father. The plaintiff stated that she did not have a problem with the children having contact with the defendant at the arranged and agreed time.

[12] The plaintiff was cross examined and she conceded that on 21st June 2016 she left the first born child who was eight years old then, in car unattended and the car burned, but luckily the child managed to escape from the car. The plaintiff stated that the car which was not that old, but burned as a result of an accident, and even up to date they do not know what caused the car to burn. Further that she had parked the car next to the door of her office, and that it was an unfortunate incident. The plaintiff conceded that she left their common home on 28th February 2020, and that she did so after she and the defendant fought for the whole night. She conceded that on 17th July 2020, the children were temporarily placed in the care of the defendant.

[13] When the plaintiff was asked whether she once locked the minor children in her flat, she stated that she only locked the butler door, and did not close the sliding door, and that she had asked her neighbour to keep an eye on them whilst she went to drop her domestic servant at the rank which was not far from where they stay. She conceded that this incident happened on 10th July 2020 when the defendant came to her flat and found the children in darkness at about 19h00. She denied that she was not involved in assisting the children to do their homework and also not attending school meetings for children. She denied that she put nude pictures of herself on face book depicting herself and another man in a swimming pool.

[14] She conceded that the school once complained about a magazine brought by their first born child to school, but that their child had being naughty by taking that magazine from their bedroom. She denied that the magazine contained nude pictures, but that it contained people wearing ladies' underwear and that they were properly dressed. When it was put to the plaintiff that the defendant

was the only one who was taking the children to doctors, the plaintiff stated that the last born child was once admitted at Medi-Clinic hospital, and she was the one who was sleeping with the child at the hospital. That concluded the evidence of the plaintiff she closed her case.

[15] The defendant called Tebogo Anna Mahlatjie as his witness. She testified that she is the social worker who had compiled the report for the children's court during March 2020, which led to temporary primary residence and care been awarded to the defendant. She stated that in her report she had also obtained collateral information from the neighbours, relatives and teachers of the minor children. At the school where the first and second born children were attending, she checked their performance whilst they were staying with both parents, and after separation, and was informed by their teachers that they have not even noticed that the minor children have changed their place of residence.

[16] However, the teachers raised concerns regarding the first born child that she was coming to school being untidy and was also withdrawn, whilst she used to be a child who was an exemplary at school. Further that she was not doing her homework, and as a brilliant learner, they will give her an opportunity to do so in class. With regard to the second born, the teachers told the witness that there was a time when he was removed from the school, and they therefore could not share any light regarding him. At the crèche, the teachers told the witness that they were concerned about his tidiness, and that his school bag was no longer packed properly like it used to be. Further that the last born child had started to be bully and was also wetting himself.

- [17] The teachers at the crèche further told the witness that they only saw the plaintiff once coming to fetch the last born, and thereafter, it was the first and second born children who were fetching the last born child from the crèche. The witness further stated that she was informed by the teachers at the crèche that before the change of the arrangement, it was the defendant who brought the last born child to the crèche in the morning, and picking him up in the afternoon. That the neighbours of the parties told the witness that they only knew that the plaintiff exists, but she travels a lot. That most of the time the children were with the defendant, and further that the children were close to the defendant, and they do not doubt that he loves them. The witness further stated that the neighbours had told her that the defendant is a responsible father, and relates well with his children.
- [18] The witness stated that she did not interview the plaintiff and the minor children, and that her report was preliminary. The witness stated that since it was not a final report, she wanted to be given an opportunity to interview the plaintiff and the minor children, but was never given that opportunity. Further that the family advocate did not contact her for an interview before he finalised his report.
- [19] The witness was cross examined, and she conceded that the absence of the interview of the plaintiff and the minor children was a huge gap in her report. The witness conceded that the report of the family counsellor contains the interviews of both the plaintiff and the minor children. The witness also conceded that she did not have a problem with the findings and recommendation of the family advocate and family counsellor.

- [20] The defendant testified under oath and stated that he is employed as a service manager at Komatsi in Polokwane since 2010. He works from 7h30 to 15h45 Mondays to Thursdays, and on Fridays is from 7h30 to 15h00. His net salary is R52 000.00 per month. He is not working on Saturdays. He does not intend changing employment or place of residence.
- [21] The house in which he currently stays with the minor children had three bedrooms, two bathrooms, separate shower, kitchen and a lounge. Bedroom one is for the defendant, bedroom two for the first born child, and bedroom three for the second and third born children. The first and second born are schooling at the same school, whilst the third born is still at the crèche. The crèche is about 600 metres from the defendant's workplace, whilst the school where the first and second born children are attending is about five kilometres from the defendant's workplace. The defendant is the one who drops the third born child at the crèche in the morning and fetches him in the afternoon. The first and second born children are using a private transport to and back from school, but sometimes the defendant takes them to school in the morning.
- [22] The defendant attends church service in Seshego every Sunday with the minor children if they are with him, as some weekends they will be with the plaintiff. During February 2020 he had a confrontation with the plaintiff, but he did not assault the plaintiff. However, the plaintiff had opened an assault case against him, which case is still pending and has been postponed to 4th March 2022. The plaintiff had also opened a domestic violence case against him which case has been finalised on 21st March 2021 when it was dismissed.
- [23] The defendant testified that he was awarded interim primary residence and care of the three minor children by the children's court on 17th July 2020. On

10th July 2020, it was the weekend in which he was supposed to spent with the minor children as per the interim order of 1st July 2020. The plaintiff did not bring the children to him at Savannah Mall as agreed. He did send the plaintiff an SMS, but she did not respond to it. The defendant decided to go to the SAPS for them to escort him to the plaintiff's flat. They arrived at the plaintiff flat around 19h00 and found that the lights in that flat were not switched on. They knocked at the door and there was no response. The butler door was locked. He called his children by their names and that is when the last born child came to the window. The first born child then switched on the lights. The second born child told him that the defendant always locked them inside the house.

[24] Whilst they were still at the plaintiff's flat, a certain lady from another flat came and phoned the plaintiff. The plaintiff answered the phone and the police told the plaintiff that they have come to collect the minor children as per the court order. The plaintiff phoned her legal representative who advised her to release the minor children to the defendant. With regard to the car that burned, he was at work when he got a call from a certain lady, who informed him that his car was burning. When the defendant arrived at the scene, he found the plaintiff and the first born child seated under a tree together with the colleague of the plaintiff. The car burned a street behind the plaintiff's workplace. With regard to the magazine that the first born child took to school, it was a ladies' magazine that contained ladies' underwear. The first born child was ten years old when she took that magazine.

[25] With regard to him refusing the minor children from communicating with the plaintiff, the defendant testified that he was coming back from work when he

saw the first born child talking on her cell phone. When the first born child saw him, she ran away into the garage and continued talking there. After the first born child finished talking on the phone, she came to him looking upset, and told him that the plaintiff was accusing her of not wanting to talk to her on the phone that the defendant bought it for her. The defendant denied bugging the first born child's phone, and also denied telling the minor children what to tell the counsellor. The defendant stated that he had never discussed this case with the minor children.

[26] With regard to the incident of the 27th February 2020, the defendant denies that the first born child had witnessed it. According to the defendant it was only him and the plaintiff in the room, and denies assaulting the plaintiff. The defendant stated that on that date, he had confronted the plaintiff about the situation in the house. That is when the plaintiff took the car keys and ran out of the house into the street. The defendant followed the plaintiff and took the car keys from her, and the plaintiff's cell phone fell to the ground. The plaintiff ran to the neighbour's house, and he went to that house to fetch the plaintiff. The neighbours intervened, and the defendant and the plaintiff went back to their house.

[27] On arrival in their homestead, the plaintiff told him that she did not feel safe to sleep in that house. The defendant decided to take the last born child and went to sleep at his sister's house. The defendant stated that there were days on which he had assaulted the first born child with a belt for being naughty, but denies assaulting her on the date stated in the family advocate's report. According to the defendant, on the date as stated by the family advocate, he came from work to collect the first born child to go to a saloon. On arrival at

home he found the first born child with her friends in the house. When the first born child saw him, she hid her friends from him. The defendant denies that on that date he had beaten the first born child but stated that he might have talked to her harshly. The defendant stated that the last time he might have beaten the first born child, might have been either during 2012 or 2013.

[28] The defendant also denies that the second born child had witnessed the incident of the 27th February 2020, as he was in a boarding school in Marken. The defendant alleges that it will be in the best interest of the minor children if they reside with him. The defendant had stated that from 2015, he had been staying with the minor children alone with the assistance of a domestic servant as the plaintiff was working in Musina. According to the defendant from 2015 to date, he has been a primary care giver of the minor children. Further that he is putting the interest of the minor children first, and that he had never gone on vacation without the minor children. That he had resigned two times from where he used to work in a battle to be next to his children. He provides stability and security for his children. He is the one who takes his children to the clinic, and had bonded with them. He teaches his children values and also takes them to church.

[29] What the children dislike about the defendant is that he does not like them to go and play and abandon their school work. The defendant alleges that it will affect the minor children if they were to move from where they are currently staying with him. He sleeps on his bed with all his children, but now that the first born is growing up, she had chased them out of her room. He makes time for his children. The plaintiff stated that he is having another child from another woman, and that he met the mother of this child before he met the

plaintiff. This child was born during 1999, and his mother has passed away whilst he was eight years old. He has been taking care of this child from the beginning.

[30] The defendant was cross examined and he conceded that he knew that the plaintiff was working in Musina, and that due to the plaintiff's work commitments, he had to take care of the children. The defendant also stated that he will allow the children to express themselves as to what was in their best interest. The defendant conceded that the children have made a choice that they wanted to be with the plaintiff. The defendant conceded that the choice that the children have made was influenced by the values he had installed in them. That concluded the evidence of the defendant.

[31] As I have already pointed out paragraph 3 above that the parties have settled all other aspects of the patrimonial consequences of their marriage in community of property, and that the only issue which this court is called upon to determine is who must retain the primary residence and care of the three minor children. It is trite that in dispute concerning the award of custody of the minor children, the test to applied is what is the best interest of the minor children. The defendant has been awarded interim primary residence and care of the minor children by the children's court on 17th July 2020. This court must therefore determine whether that interim order should be confirmed or varied by awarding the primary residence to the plaintiff. Both parties are in agreement that they are both fit and proper to be awarded the primary residence and care of their minor children. Both parties in their settlement agreement have agreed on the parental responsibilities and rights over the minor children.

[32] In *Stock v Stock*¹ Diemont JA said:

“It has been said repeatedly by the Courts that where there is dispute concerning the award of custody of minors there is substantially one norm to be applied, namely the predominant interest of the children. The same norm applies where the dispute relates, not to the award, but the variation of a custody order or where application is made to remove the children out of the jurisdiction of the Court. The parent who seeks such relief will be called upon to show good cause, that is he or she will have to satisfy the Court on balance of probabilities that the order made at the time of divorce should be varied. There are many factors to which the Court will have regard in determining whether the welfare of the children calls for such variation. So, for example, where there are several children in the family, it may well be deemed inadvisable to separate the siblings. Then again the Court will bear in mind that any variation in the order will have a more lasting effect on the younger children than it will on the older children who will become independent sooner and can then make their own decisions.”

[33] The order of the 17th July 2020 even though it is an interim relief, is sixteen months old, which is long enough to have made the minor children to have settled and adapted to their current living arrangement. That in my view, should be treated in the same manner as variation of custody order. The onus will therefore be on the plaintiff to satisfy this court on balance of probabilities why the order of the children’s court should be varied. The minor children are already used to a certain standard of living with the defendant, which will not be the same if primary residence and care was to be awarded to the plaintiff. Section 7(1) of the *Children’s Act*² (Act) list the factors which should be considered whenever the best interest of a child standard is to be applied.

[34] Section 7(1) of the Act provides as follows:

¹ 1981 (3) SA 1280 (A) at 1290F-H

² 38 of 2005

“Whenever a provision of this Act requires the best interest of a child standard to be applied, the following factors must be taken into consideration where relevant, namely-

(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 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 regular basis;

(f) the need of the child-

(i) to remain in the care of his or her parent, family and extended family; and

(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 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-
 - (i) 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, 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 minimise further legal or administrative proceedings in relation to the child."

[35] In *AB and Another v Minister of Social Development*³ Nkabinde J said:

"Section 7 deals with the best interest of the child. Section 7(1) states that, when the best interest of the child standard is required by a provision of the Children's Act, the standard must be applied and several factors must be taken into consideration, where relevant. Moreover, section 7(1) should be read with section 28(2) of the Constitution."

[36] The family advocate and family counsellor have interviewed the plaintiff, defendant and all the three minor children, and also made follow up

³ 2017 (3) SA 570 (CC) at para 252

interviews. The family advocate and family counsellor have also visited both places of residence of the plaintiff and the defendant before compiling their final reports. According to the reports of both the family advocate and family counsellor, all the three minor children's wishes are to reside with the plaintiff, and that they will visit the defendant during school holidays whom they love very much. The recommendations of both the family advocate and family counsellor is that the primary residence and care of the minor children be awarded to the plaintiff.

[37] The family counsellor in her report has recorded that the first born child had told her that the defendant had told her to tell the family advocate that she wanted to reside with him, whilst the plaintiff told her to tell the family advocate the truth. Further that the first born child told the family counsellor that she was afraid to tell the truth as she was afraid of the defendant, but that the truth was that she wanted to reside with the plaintiff. The first born child further told the family counsellor that she had witnessed the defendant beating the plaintiff, and also breaking the plaintiff's laptop. The first born child also told the family counsellor that the defendant does not allow her to bring her friends to the house, that one day the defendant found her in company of her friends in the house and beat her with a belt so much. The family counsellor in her report has recorded that the concluding remarks of the first born child was that the family counsellor in her report should not write something that will make the defendant angry.

[38] With regard to the second born child, the family counsellor had recorded that he had told her that he misses his mother and wishes to go and stay with her, and that he will visit the defendant during school holidays. Further that the

second born child had told the family counsellor that the defendant had never assaulted him, but he had witnessed the defendant assaulting the first born child with a belt, and had also seen the defendant assaulting the plaintiff, and was afraid that the defendant was going to kill the plaintiff. With regard to the last born child the family counsellor had recorded the he had told her that he misses the plaintiff and wishes to go and stay with her.

[39] According to the report of the family counsellor, the factors which she had considered in arriving at the conclusion that it will be in the best interest of the minor children if the primary residence and care is awarded to the plaintiff are (i) the nature of the personal relationship between the child and the parents, or any specific parent and the child and any other care-giver or person relevant in those circumstances; (ii) the attitude of the parents, or any specific parent, towards the child and the exercise of parental responsibilities and rights in respects of the child; (iii) 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; and (iv) the child's age, maturity and stage of development.

[40] The family advocate in his report has recorded that from the information he had received, both the plaintiff and the defendant have been in contact with the minor children since their separation; both parties did not have a meaningful communication relating to matters affecting the minor children, but have promised to improve the communication; both parties described each other as having a good relationship with the minor children; that the reasons submitted by the defendant to seek primary residence of the minor children are reasons intended to tarnish and makes the plaintiff

unfit to take care of the minor children, whilst those reasons did not qualify that the plaintiff was unfit to take care of the minor children; and that the parties have unresolved marital issues, and that their divorce had clouded their ability to consider what is in the best interest of the minor children. Further that anger and pointing of fingers against each other is the order of the day within the lives of the plaintiff and defendant.

[41] In conclusion, the family advocate has stated that both parties have demonstrated the ability to can provide a conducive environment for the minor children to reside, however the minor children have expressed their wishes which should be taken into account. Further that the minor children were speaking freely and voluntarily without feeling the pressure of being couched. Further that both parties are gainfully employed, and they all have the required resources to take care of the minor children.

[42] Section 7(1) of the Act list fourteen factors which must be taken into consideration where they are relevant, in determining the best interest of the child's standard. Counsel for the defendant had submitted that in considering the child's best interest, the court must consider all the fourteen factors as listed in section 7(1) of the Act in its totality, and further that the family counsellor's report is flawed, as she had considered only four factors in arriving at her final conclusion.

[43] Section 7(1) state that these factors must be taken into consideration where relevant. It clear that the legislature never intended that all the fourteen factors mentioned in the section to be considered cumulatively. Only those factors that are relevant to the case at issue should be considered. In the case at hand there is no evidence presented that any of the minor children is

disabled or having chronic illness. Therefore, factor nine and ten will not be relevant to the case at hand. The family counsellor had considered the factors which she viewed to be relevant to the case she was dealing with. Even the defendant's experts witness conceded that there was nothing wrong with the method and procedure which the family advocate and family counsellor had followed in compiling their reports.

[44] The family advocate and family counsellor have both interviewed the plaintiff, defendant, minor children and have also visited the places of residence of both parties. In conclusion, the family advocate has stated that both parties have demonstrated the ability to can provide a conducive environment for the minor children, and have also the required resources to take care of the minor children as they are both gainfully employed. In my view, the family advocate and family counsellor have produced well balanced reports taking into consideration the factors which they considered to be relevant to the case at hand. The same cannot be said with the report of the expert witness of the defendant. Her report was one sided as she did not interview the plaintiff and the minor children.

[45] In *Stock v Stock* above, it was held that an expert witness must be made to understand that he is there to assist the court, and if he is to be helpful, must be neutral, and that the evidence of such a witness is of little value where he, or she, is partisan and consistently assert the cause of the party who calls him. At the time when the defendant's expert witness testified before this court, she did not have had an opportunity to interview the plaintiff and the minor children. It is clear that her report at the children's court was favouring only the defendant. In in this court she was still pursuing the

version she presented in the children's court which was one sided. In my view, the report of the defendant's expert witness is not neutral, and is therefore of little value to this court.

[46] In terms of section 10 of the Act, depending on the age, maturity and stage of development as to enable that child to participate in any matter concerning that child, has the right to participate in an appropriate way, and the views expressed by that child must be given due consideration. All the minor children have expressed their wishes, and their wishes are to stay with the plaintiff. However, the children's wishes may not be the only determining factor as to what is their best interest under the circumstances. Some of the factors listed in section 7(1) of the Act which are relevant to their case must be taken into consideration.

[47] As per the report of the family advocate, both parties are fit and proper to take care of their minor children, have demonstrated the ability to can provide a conducive environment for the children to reside, are gainfully employed and have all the required resources to take good care of the minor children. Both parties' have almost similar reporting and knocking off time in their respective workplaces, and also works from Mondays to Fridays, and they both work in Polokwane nearer to the minor children. According to the family advocate's report, it would not be fair and not be in the best interest of the minor children if their wishes are not taken into account. As I have already pointed out in paragraph 46 above, the children's wishes are not the only determining factor.

[48] Taking into consideration the evidence presented by the parties themselves, and the reports of the family advocate and family counsellor, both parties are

not that perfect. They have their own flaws. The plaintiff in 2016 left the first born child alone in a car that burned down completely, but luckily the child managed to escape from the burning car; the plaintiff is accused of having given the first born child a ladies' magazine which the school has found it not to be proper for a school environment; and that the plaintiff was found to have locked the children in her flat and left them there alone. The defendant on the hand, the first born child has told the family counsellor that she had witnessed the defendant beating the plaintiff, and also breaking the plaintiff's laptop. The first born child has also told the family counsellor that the defendant had once beaten her with a belt, and also does not want her to bring her friends to the house. The beating of the plaintiff and the first born child by the defendant was corroborated by the second born child. The second born child had also told the family counsellor that the way he saw the defendant beating the plaintiff that day, he thought he was going to kill her.

- [49] At time of compilation of the reports of the family advocate and family counsellor, the first born child was aged twelve and thirteen years, second born aged six years, and fourth born aged four and five years. The question is whether the age, maturity and development of the minor children was of such that they will be able to express their views, and to what extent must the court give their views due consideration. Counsel for the defendant had argued that the second and third born children at the time of the compilation of the reports by the family advocate and family counsellor have not yet attained the intellectual capacity and maturity to the extent that it can be said that they have not expressed their wishes. Counsel for the defendant did not say anything about the first born. The first

born child had made damaging statements against the defendant which to some extent corroborate the plaintiff's version that she was beaten by the defendant. A criminal case on that aspect has been opened by the plaintiff against the defendant, and the case is still pending. It is not for this court to adjudicate upon the criminal case, but will merely take note of its existence.

[50] Despite the imperfectness in both parties, what is of paramount importance, is the best interest of the minor children. In *Fortune v Fortune*⁴ Schreiner JA said:

"The courts have always had the power to give custody to one or other parent; the principles on which such orders should be made have come to us from the Roman-Dutch authorities and been developed in modern decisions. The section was apparently designed to free the Courts from limitations, which might even at the present time be thought to exist at common law, on their freedom to treat the interests of the minor as the sole factor. But there is no clear indication that the Legislature intended to compel the Judge to give effect to the preponderance of benefit to the minor's interest, once that is established. The preponderance, though sufficient to justify an order where the interest of minor alone are regarded, may yet be slight enough to make it reasonable to take account of the guilt or innocence of the respective parents or the degrees of hardship that would be involved in an order granted one way or the other."

[51] This court is mindful of the fact that for the past sixteen months, the minor children have been staying with the defendant, and it is not desirable to subject the minor children to change living conditions time and again. The minor children love both of their parents, but their parents have put them in a muddy situation. The 2016 incident wherein the plaintiff left the first born child alone in a car that completely burned down, in my view,

⁴ 1955 (3) SA 348 (A) at 353F-H

was a freak accident which can happen to anyone. It was never planned, and the car was parked next to the plaintiff's office. As a police officer, she knew the area well, and could not have left the car with her own child at an unsafe area. Regarding the issue of the magazine that the first born child has taken to school and the school did not approve of her been in possession of it, both parties have testified that the magazine contained people wearing ladies' underwear. At age ten the first born child was reaching puberty stage, and as a female she will be interested in ladies' staff, which in some instances she would like to share with her friends. There was no evidence presented that the magazine contained nude/porn pictures, which in that case will be concerning. In my view, the issue of the magazine is being blown out of proportion.

- [52] Regarding the issue that the minor children were found alone at about 19h00 locked in the plaintiff's flat, the plaintiff testified that she locked only the butler door, had not gone far and had also requested her neighbour to put an eye on them. This incident took place on the 10th July 2020. July is mid-winter and by that time it will be already dark outside and not safe the minor children to be still roaming on the street. By locking the butler door and requesting her neighbour to put an eye on the minor children when she went to drop her domestic servant at the rank which was not far from where they stay, in my view, did not amount to child neglect. There is no evidence that the plaintiff had instructed the minor children to stay in darkness and not switch on the lights. It was by their choice to stay in darkness as when the defendant requested them to switch on the lights they did so without any complaint. The plaintiff did not go far from her flat, and had left a four and six years old children in the company of a twelve years old child. Even

though the plaintiff should have learnt her lesson as to what had happened in 2016 when she left the first born child alone in the car, in this case she had requested a neighbour to put an eye on them, and in my view, it is being blown out of proportion.

[53] Regarding the defendant, he had conceded having assaulted the first born child. Both the first born and second born child have told the family counsellor that they have witnessed the defendant assaulting the plaintiff in their presence, and the second born child even thought that the defendant was going to kill the plaintiff. The second born child had also witnessed the defendant assaulting the first born child with a belt. South Africa is fighting the scourge of family violence which had engulfed the entire country. Parents are the role models of their children, and whatever they are doing, it is most likely that their children will copy from them. The defendant will like to raise two boys whom he is exposing them to copy from him that one solves his differences with his partner by beating her. In that case the war against gender based violence will never be won as the children are already being groomed to beat their partners.

[54] Some children perform well at school when they do their work as a group. In the defendant's case, the defendant's does not want his children to bring their friends in his house. The defendant's children must therefore live like islands. The concluding remarks of the first born child to the family counsellor that she must not write something in her report that will make the defendant angry as she was afraid of him, shows that the defendant has installed fear in the minor children, and are therefore not living in healthy environment where they are

free to enjoy their childhood. They are always in constant fear of the defendant which is not good for their wellbeing.

[55] In my view, the defendant by beating the plaintiff and his first born child in front of the other children is exposing his children to violence, and also abusing the first born child. These are going to have some long term psychological effect on the minor children and is therefore not conducive from them to grow in such an unhealthy environment. In my view, it will be in the best interest of the minor children if primary residence and care is awarded to the plaintiff.

[56] In the result I make the following order:

56.1 Decree of divorce incorporating the deed of settlement is granted.

56.2 Primary residence and care of all the minor children is awarded to the plaintiff subject to the following parental responsibilities and rights over the minor children:

56.3 Both parties shall remain co-holders of full parental responsibilities and rights with regard to the care, guardianship and maintenance of the children.

56.4 The plaintiff will allow the defendant to exercise the parental responsibilities and rights with regard to contact as follows:

56.4.1 To have children on alternate weekends.

56.4.2 To share short and long school holidays, the period of Christmas and New Year to be alternated between the parties.

56.4.3 Special days such as children's birthdays shall be alternately celebrated.

56.4.4 The plaintiff shall be with the children on her birthday and on mother's day.

56.4.5 The defendant shall be with the children on his birthday and on father's day.

56.4.5 There shall be reasonable daily telephonic contact with the children.

56.5 Each party to pay his/her own legal costs of the divorce action.

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

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Instructed by	: DDKK Attorneys Inc
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